SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SEVENTH CIRCUIT JANUARY 1994–DECEMBER 1999

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U.S. Sentencing Commission Guidelines Manual
Case Annotations—Seventh Circuit

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Griffith, 85 F.3d 284 (7th Cir), *cert. denied*, 117 S. Ct. 272 (1996). The appellate court affirmed the defendant's conviction and sentence, and held that the sentencing guidelines were not unconstitutional as applied. The defendant asserted that the Commission's actions in promulgating the guidelines were invalid because they violated the separation of powers; the due process clause; the bicameral passage and presentment requirements; and were inconsistent with statutory mandates which dictate the powers of the Commission. The court rejected the separation of powers and presentment clause issues because the defendant failed to demonstrate that the Commission's exercise of legislative power was more extensive than already acknowledged by the Supreme Court in Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647 (1989). The court rejected the due process argument stating that Sentencing Reform Act did not require the Commission to adopt rules and regulations governing its procedure. The court also rejected the defendant's statutory mandate argument, concluding that he had not explained how he had been specifically injured by any of the alleged failings of the Commission. Furthermore, the court noted that the defendant's suggestion that the money laundering guideline violated 28 U.S.C. § 994(j) by not prescribing a sentence other than a term of imprisonment for cases such as his was contradicted by Congress's rejection of the Commission's prior attempts to provide lower sentences for that offense.

Part B General Application Principles

§1B1.3 Relevant Conduct

United States v. Corral-Ibarra, 25 F.3d 430 (7th Cir. 1994). The district court did not err in attributing to defendant Herrera the entire amount of cocaine involved in the conspiracy. The defendant argued that he should only be accountable for the two kilograms of cocaine that he saw when he inspected the cocaine offered by the undercover agents. He proffered testimony which established that he was not aware of how much cocaine was involved in the shipment and that therefore, he could not have reasonably foreseen the entire 50 kilograms. The circuit court drew a distinction between direct and remote involvement in illegal activity and likened the defendant's role in the conspiracy to the off-loader in Example (a) of USSG §1B1.3, application note 7. The defendant boarded the boat on which the cocaine was stored, sampled the cocaine and then verified its adequacy with his co-conspirators. The circuit court considered this as evidence of his "direct, personal role in furtherance of the attempt to obtain and distribute a large quantity of cocaine." "As explained in Application Note 1 to [section 1B1.3(a)(1)], reasonable foreseeability in the context of §1B1.3(a)(1) applies only to conduct `for which the defendant would be otherwise accountable,' and not to the preceding clause relating to all `acts or omissions committed or aided and abetted by the defendant.'"

United States v. Cooper, 39 F.3d 167 (7th Cir. 1994). The defendant was sentenced to a mandatory sentence of life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A)(iii). He was convicted of conspiring to distribute and to possess with intent to distribute over 500 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The defendant asserted that the district court erred in considering uncharged amounts of crack cocaine in determining his sentence. The appellate court determined that no error occurred. "The 50 grams of crack cocaine for which Cooper was sentenced was, without a doubt, part of the same conspiracy as that charged in the count of conviction." *See* United States v. Payne, 940 F.2d 286, 293 (8th Cir.), *cert. denied*, 502 U.S. 994 (1991) (crack was part of the same cocaine conspiracy charged in the counts of conviction; sentences were not unconstitutional even though the indictments did not specify that crack cocaine would be included in calculating base offense levels).

United States v. Hatchett, 31 F.3d 1411 (7th Cir. 1994). The district court did not err in holding the defendant responsible for an amount of cocaine that was part of the same course of conduct or common scheme or plan. The defendant challenged the inclusion of 10.8 grams of cocaine base found in the toilet bowl during a search of her residence as relevant conduct. The circuit court considered "whether similar parties were involved in each transaction, the geographic relationship, the temporal relationship and any other relationship between the convicted offense and the relevant conduct." United States v. Crawford, 991 F.2d 1328 (7th Cir. 1993). The evidence established that the defendant participated in her daughter's drug selling activity, and the fact that the defendant was only present during the second of three transactions was irrelevant to the determination that the challenged quantity was part of the same course of conduct.

United States v. Ritsema, 31 F.3d 559 (7th Cir. 1994). The district court incorrectly interpreted the scope of relevant conduct. The defendant sexually assaulted his mentally retarded 14-year-old neighbor. On one occasion he showed her a gun with a silencer and threatened that if she told anyone about the abuse, "a lot of people will get hurt." Although the sexual assault was prosecuted at the state level, the defendant was charged at the federal level for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and for possession of unregistered silencers, in violation of 26 U.S.C. § 5861(d). He pleaded guilty only to the possession of unregistered silencers. The district court applied the cross-reference provision of USSG §2K2.1 because it concluded that the defendant's threats constituted an obstruction of justice. Applying §2J1.2, the district court again cross referenced to USSG §2X3.1 because the defendant obstructed the investigation or prosecution of a criminal offense. Based on §2X3.1, the court then determined that the offense underlying the obstruction of justice was criminal sexual abuse. After calculating the offense level pursuant to §2A3.1, the district court also enhanced the defendant's sentence pursuant to §3A1.1 and also denied the defendant an adjustment for acceptance of responsibility. The circuit court concluded that on the facts in this case, USSG §1B1.3 did not support the cross-reference. Although the threats occurred during "the commission of the charge-offense,"(the possession of unregistered silencers), USSG §1B1.3(a)(1), the temporal aspect of relevant conduct requires more than mere contemporaneous conduct; the defendant's threats were effective because of the rifle, not the silencer, and the threats were not relevant to the possession of the silencer alone. Further, the circuit court concluded that the defendant's obstruction was not relevant to the vulnerable victim enhancement; possession of a silencer is a victimless crime, and the 14 year old could not be a victim of the defendant's offense of conviction. Finally, because the circuit court

concluded that the defendant's obstruction of justice was not relevant conduct, the district court erred in denying the defendant an acceptance of responsibility adjustment based on his denial of the threatening conduct.

United States v. Span, 170 F.3d 798 (7th Cir. 1999), *petition for cert. filed* (June 21, 1999). The district court erred in attributing drugs to the defendant as the drug quantity lacked an adequate basis. The court's calculation was based primarily on the defendant's drug transactions with two men. The trial court noted discrepancies existing between the trial testimony and initial statements the men made to police. The appellate court noted that when a sentencing court relies upon one of two contradictory statements, "it should directly address the contradiction and explain why it credits one statement rather than the other." In absence of an explanation or other evidence justifying the court's choice of one version over the other, the judge's calculation lacked an adequate basis.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. McGee, 60 F.3d 1266 (7th Cir. 1995). The district court did not commit plain error in failing to apply the amended guidelines. The defendant argued that the statute mandating imprisonment for his violation of supervised release terms violated the ex post facto clause. The violations included cocaine possession and failure to submit to urinalysis. The circuit court rejected the defendant's argument that the 1994 amendment to 18 U.S.C. § 3583 altered the punishment for cocaine possession to his detriment. The circuit court followed the reasoning in California Dep't of Corr. v. Morales, 115 S. Ct. 1597 (1995), and held that the defendant was not subject to increased punishment under the amended statute. In that case, the Supreme Court stated that the ex post facto clause does not forbid any legislative change that has any conceivable risk of affecting a prisoner's punishment; rather a court must determine whether the legislative change produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. In the case at bar, the circuit court used this reasoning to hold that the amendment does not produce a detriment to the defendant; rather, it narrows the range of punishment to his benefit. Thus, the circuit court affirmed the district court's sentence of 24 months.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

United States v. Anderson, 61 F.3d 1290 (7th Cir.), *cert. denied*, 516 U.S. 1000 (1995). The district court did not err in applying the sentencing guidelines in effect at the time of the defendant's sentencing. The defendant was convicted for knowingly or intentionally possessing piperidine and knowing or having reasonable cause to believe it would be used to manufacture a controlled substance. The district court, using the 1992 version of the sentencing guidelines, enhanced the defendant's sentence for possessing a firearm pursuant to USSG §2D1.1 resulting in a sentence of 120 months imprisonment. On appeal, the defendant challenged the district court's use of the 1992 version of the guidelines as violative of the ex post facto clause because the 1990 version, the guidelines manual in effect at the time the defendant committed his offense, contained a more lenient version of the weapon enhancement. The circuit court ruled that the district court did not err in applying the 1992 guidelines. The circuit court noted that "the Tenth Circuit has held on similar facts that there is no ex post facto problem when the Guidelines Manual in effect at sentencing, taken as a whole, cannot possibly generate a sentence more severe than the most lenient

sentence available at the time the defendant committed his offense." *See* United States v. Nelson, 36 F.3d 1001, 1004 (10th Cir. 1994) (upholding use of 1992 Guidelines even though defendant would have received lower enhancement under 1988 Guidelines because defendant received equivalent reduction in sentence under different provision of 1992 Guidelines). The circuit court recognized that decisions on this issue clearly indicate that guidelines amendments will not raise ex post facto concerns if, "taken as a whole," they are "ameliorative." *See* Miller v. Florida, 482 U.S. 423 (1987) (concluding that an amendment to Florida's sentencing guidelines violated the ex post facto clause by increasing the petitioner's presumptive sentence after he had committed the offense of conviction).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994). The defendants were convicted of explosives and firearms violations in connection with a bombing/burglary scheme that resulted in a death. The defendants challenged the application of USSG §2A1.1, First Degree Murder, under the directive of USSG §2K1.4(c) as the most analogous guideline to the offense conduct. The circuit court held that the sentencing court need not search for an exact match between the conduct covered under USSG Chapter 2 and the conduct under §2K1.4. Notwithstanding the absence of any fire, and the stipulation that the bomb was not detonated with the intention of killing someone, the circuit court found that the bombing was sufficiently similar to arson to apply the analogous first degree murder guideline.

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994). The district court did not err in enhancing the defendant's sentence for bodily injury to the victim pursuant to §2B3.1(b)(3)(A), where the victim suffered bumps and bruises, had "the wind knocked out of him," and sustained a back injury requiring chiropractic treatment. The circuit court rejected the defendant's claim that "bodily injury" occurs only when the injury requires "medical treatment." Rather, the circuit court agreed with Fourth Circuit precedent that the degree of injury depends on a "myriad of factors" which the district court is best suited to assess. Here, the district court's determination that the injury was painful and obvious was supported by the facts and not clearly erroneous. Also, the district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1, where testimony given at trial was sufficient to show that, prior to the trial, the defendant attempted to convince a witness to give false testimony.

United States v. Hunn, 24 F.3d 994 (7th Cir. 1994). The district court did not err in enhancing the defendant's sentence for express death threats made during the course of a bank

robbery. USSG §2B3.1(b)(2)(f). The defendant handed the bank teller a note which read, "Give me all the money now. I have a gun. No tricks, I'm watching," and gestured that he had a gun pointed at the teller through his right pocket. He argued that this conduct was not an "express death threat." Noting a conflict among the circuits that have decided this issue, the circuit court adopted the Eighth Circuit's approach that nothing in the guidelines limits the express death threat to the spoken word. United States v. Smith, 973 F.2d 1374 (8th Cir. 1992) (defendant's statement combined with his gestures that he had a gun sufficiently communicated an express death threat); *but see* United States v. Canzater, 994 F.2d 773 (11th Cir. 1993) (defendant's threat to use a gun only implies a threat of death). The circuit court relied on application note 6 to USSG §2B3.1, which specifically provides the "`express threat of death' may be in the form of an . . . act, gesture, or combination thereof." Further, the note explains that the enhancement is appropriate when the defendant's conduct instills in a reasonable person, who is the victim of the robbery, significantly greater fear than that necessary to comprise an element of the crime. USSG §2B3.1, comment. (n. 6). The circuit court held that a defendant's acts or gestures such as those present here may form the basis for an enhancement for an express threat of death.

United States v. Ramacci, 15 F.3d 75 (7th Cir. 1994). The district court did not err in including incomplete or defective bills in determining the "face value" of counterfeit currency in sentencing a defendant pursuant to USSG §2B5.1(b)(1). The Seventh Circuit joined the Eighth and Second Circuits to hold that the limitation on consideration of bills that are "so obviously counterfeit that they are unlikely to be accepted if subjected to only minimal scrutiny" of USSG §2B5.1(b)(2) does not apply to someone sentenced under subsection (b)(1). *See* United States v. Lamere, 980 F.2d 506 (8th Cir. 1992); United States v. Rodriguez, 989 F.2d 583, 586 (2d Cir. 1993).

United States v. Raszkiewicz, 169 F.3d 459 (7th Cir. 1999). The district court did not err in enhancing a bank robber's sentence for a threat of death when the robber pointed an unknown object at the teller and gestured with his hand in his jacket as if he had a gun. The Seventh Circuit found that a "reasonable" victim would fear death and, therefore, the (b)(2)(F) adjustment was proper.

§2B5.1 Offenses Involving Counterfeit Bearer Obligations of the United States

United States v. Ramacci, 15 F.3d 75 (7th Cir. 1994). In sentencing the defendant for conspiracy to counterfeit over $600,000 in United States currency, the district court did not err in including approximately $260,000 in partially completed bills, printed on the back only, in its sentencing calculation. The circuit court reasoned that nothing in §2B5.1 requires that the counterfeit bills be complete to be included in sentencing at "face value." Application Note 2, which requires that a bill be "falsely made or manufactured in its entirety," does not require that the bill be complete, but only that it not be a genuine instrument which has been altered. The circuit court cited other circuit precedent, legislative history, the rejection of a proposed application note, and the language of §2B5.1(b)(1) and (2) to conclude that a counterfeit bill need not be complete to be included in sentencing calculations. The circuit court also held that the record supported the district court's enhancement of the defendant's sentence under §3B1.1(c) for his role as an "organizer, leader, manager or supervisor."

§2B5.3 Criminal Infringement of Copyright

United States v. Sung, 51 F.3d 92 (7th Cir. 1995). The appellate court remanded the case for resentencing where the defendant was convicted of selling and attempting to sell counterfeit hair care products in packaging bearing the trademarks and symbols of a recognized commercial hair care manufacturer. At issue was the calculation of the retail value of the infringing products. The defendant bought 1,100 gallons of a liquid to sell, enough to fill 17,600 bottles, with a retail sales value of $4.00 per bottle. However, he also bought 20,000 shipping cartons, which could each hold 12 bottles. The district court sentenced the defendant based on $960,000, the value of 240,000 bottles (20,000 cartons x 12 bottles). The appellate court stated that "§2B5.3 tells the court to impose a sentence based on the retail value of the infringing products; §2F1.1 does not answer the question whether the infringing boxes should be treated as if they represented the retail value of the completed product or only the value of the boxes themselves; to answer that question one visits §2X1.1 and learns that everything depends on how close the defendant came to completing additional crimes." On remand, the district court must determine "if the intent to sell 240,000 bottles has been established `with reasonable certainty'."

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

Ambriz v. United States, 14 F.3d 331 (7th Cir. 1994). The district court did not err in denying the defendant's petition for writ of habeas corpus on grounds that he could not show actual prejudice from the errors of which he complained. The defendant argued he had been prejudiced when the district court sentenced him on the basis of one kilogram of cocaine, where he believed he possessed one kilogram of cocaine but the government had substituted all but 22.5 grams of cocaine with dirt. The defendant claimed the dirt, like waste water, should not count for sentencing purposes because it did not serve as a dilutant, cutting agent or carrier medium and did not increase the amount of cocaine available at the retail level. The circuit court pointed out that in this case, unlike cases involving waste water, the defendant actually believed the material he

possessed was cocaine. Accordingly, the circuit court, relying on Seventh Circuit precedent and §2D1.1 provisions, held that the drug quantity should be based on the amount of cocaine the defendant tried to possess, and not the amount he actually possessed.

United States v. Buchannan, 115 F.3d 445 (7th Cir. 1997). The district court properly adopted the defendant's version of the amount and type of drugs involved in the offense when calculating the defendant's total offense level. The defendant maintained that all his discussions with undercover agents concerned the sale of powder cocaine, not crack cocaine. The government argued that the defendant's sentence should be vacated because the district court failed to make the required factual findings to support its choice of offense level. The circuit court disagreed, holding that normally a case such as this would be remanded for findings by the district court regarding the amount and type of drugs attributable to the defendant. In some cases, however, the court can uphold a sentence where the district court's implicit findings seemed sufficient. *See* United States v. McKinney, 98 F.3d 974, 980-81 (7th Cir.), *cert denied*, 117 S. Ct. 1119 (1997) (affirming the sentence despite a lack of express findings where it was clear from the sentencing transcript that the district court adopted the drug quantities in the presentence report). The circuit court concluded that the government had failed to carry its burden of proof after reviewing the transcript of the sentencing hearing, the presentencing investigation report, and the testimony of the defendant. Thus, the court properly erred on the side of caution and adopted the defendant's version of the amount and type of drugs involved. *See* United States v. Acosta, 85 F.3d 275, 282 (7th Cir. 1996).

United States v. Cotts, 14 F.3d 300 (7th Cir. 1994). The district court properly attributed to the defendant Rodriguez the full amount of cocaine involved in one of several transactions. Relying on USSG §2D1.1, application note 12, the defendant argued that he should not be accountable for the full amount of cocaine agreed to in a reverse sting because he did not have the money with which to purchase the drugs. Although the note does not expressly cover reverse stings, the Seventh Circuit has held that it is applicable in such situations. *See* United States v. Cea, 963 F.2d 1027, 1031 (7th Cir.), *cert. denied*, 113 S. Ct. 281 (1992). However, where, as here, the defendant is a mid-level distributor and his "negotiators" front him the drugs with the understanding that he will pay for the drugs from subsequent sales, a lack of funds is not indicative of the defendant's inability to purchase the negotiated amount.

United States v. Lacour, 32 F.3d 1157 (7th Cir. 1994). In addressing an issue of first impression, the circuit court upheld the lower court's use of the gross weight of the dilaudid tablets in determining the defendant's offense level. The defendant argued that his sentence should have been based on the weight of the controlled substance alone because 21 U.S.C. § 841(b)(1)(C), under which he pleaded guilty, does not refer to the weight of a "mixture or substance" as do subsections (A) and (B). He averred that the absence of "mixture or substance" language in subsection (C) was evidence of Congress's intent to include only the weight of the controlled substance in the offense level determination. The circuit court joined the Eighth, Ninth and Eleventh Circuits in holding that the gross weight of the pills should govern sentencing calculations. *See* United States v. Young, 992 F.2d 207 (8th Cir. 1993) (the Commission adopted the same method of calculating offense levels for pharmaceuticals as Congress used for drugs penalized under subsections (A) and (B)); United States v. Crowell, 9 F.3d 1452 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 138 (1994) (§2D1.1 and application note 1 support that the gross weight of

hydromorphone should be used for sentencing purposes); United States v. Lazarchik, 914 F.2d 211 (11th Cir.), *cert. denied*, 502 U.S. 827 (1991).

Marijuana Offenses

United States v. Damerville, 27 F.3d 254 (7th Cir.), *cert. denied*, 513 U.S. 972 (1994). The district court did not err in determining that 17.2 grams of marihuana was not a "small amount," and thus did not qualify as a misdemeanor under 21 U.S.C. § 844. The circuit court, reasoning that quantity was not the only consideration in determining "amount," held that 17.2 grams of marihuana, when smuggled into a federal prison and considered in light of the availability of drugs in prison, is not for sentencing purposes "small."

United States v. Young, 34 F.3d 500 (7th Cir. 1994). The district court erred in sentencing the defendant based on a number of marijuana plants, instead of the weight of marijuana the defendant brokered. The district court had used an equivalency formula provided in testimony given in the trial of the defendant's co-conspirator that one plant yielded approximately .25 pounds, a ratio the district court "imputed" to the defendant. The circuit court, citing Seventh Circuit precedent and USSG §2D1.1, held that the district court should not have imputed this formula to the defendant unless this ratio was reasonably foreseeable to the defendant. Because the district court made no such finding in this case, it should have sentenced the defendant based simply on the 700 pounds for which it found him responsible in the first place.

Weapon Enhancement

United States v. Montgomery, 14 F.3d 1189 (7th Cir. 1994). The district court erred in applying a two-level upward adjustment for the possession of a firearm pursuant to USSG §2D1.1(b)(1) when the defendant was convicted of two counts of possession with intent to distribute crack and there was no evidence that the defendant possessed any firearm during the commission of either of those offenses. The firearm in question had been seized in a search of the defendant's residence five months prior to his arrest for the instant offenses. Although the gun was returned at that time because the search yielded no evidence of criminal activity, it was not found in defendant's possession when the defendant was arrested for the instant offenses.

United States v. Mumford, 25 F.3d 461 (7th Cir. 1994). The district court did not err in increasing defendant Robert Springfield's base offense level by two levels for possession of a firearm. The defendant pleaded guilty to possession with intent to deliver cocaine. He argued that the enhancement did not apply because he was not charged with weapon possession and the weapon was possessed by one of his co-defendants. Although the circuit court noted that the guidelines at one time did limit the enhancement to possession of a weapon during the commission of the offense of conviction, the 1991 amendment to USSG §2D1.1 extended the scope of the provision to require consideration of relevant conduct. Thus, the enhancement is "applicable where the defendant is accountable for the possession of a weapon by a co-conspirator during drug trafficking conduct relevant to the offense of conviction, of which the defendant was charged but not convicted, even where the weapon was not present during the offense of conviction." The rules of relevant conduct for purposes of the weapons enhancement apply to single-offense

narcotics transactions, "even if the conspiracy count is dismissed." *See* United States v. Roederer, 11 F.3d 973, 982-83 (10th Cir. 1993); United States v. Falesbork, 5 F.3d 715, 720 (4th Cir. 1993).

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit

United States v. Andersen, 45 F.3d 217 (7th Cir. 1995). The district court did not err in sentencing the defendants under §2F1.1 instead of §2N2.1, where the defendants were convicted of manufacturing and compounding drugs in their basement and failing, with the intent to defraud and mislead, to register the site with the FDA in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 331(p) and 333(a)(2). The defendants recognized that §2N2.1, which applies to food and drug offenses, directs the court to apply §2F1.1 "if the offense involved fraud." However, the defendants argued that §2F1.1 could not be applied because the evidence established only that they defrauded a regulatory agency, not their customers, and that fraud on a regulatory agency does not support the use of §2F1.1. The circuit court disagreed, joining the Fifth and Ninth Circuits in holding that "there is no meaningful distinction between the government as a victim and individual consumer victims," and thus evidence of fraud on a regulatory agency is sufficient to invoke §2F1.1. *See* United States v. Cambra, 933 F.2d 752, 756 (9th Cir. 1991); United States v. Von Mitchell, 984 F.2d 338 (9th Cir. 1992); United States v. Arlen, 947 F.2d 139 (5th Cir. 1991), *cert. denied*, 502 U.S. 939 (1992). However, the district court erred in enhancing the defendants' sentence under §2F1.1 based on the their profits. The circuit court agreed with the district court that under §2F1.1 gain is usually an appropriate means of estimating loss, but noted that this method of estimation can only be used if it results in a "reasonable estimate of the loss." In the case at bar, there was no clear evidence that the customers or consumers suffered any loss. In fact, the circuit court noted that the defendants' customers were "pleased" with the defendants' services, and that the defendants were "serving a niche in the market not served by others." Accordingly, the circuit court concluded that while an upward departure may be warranted based on the non-monetary risk to human and animal health caused by the defendants' offenses, a sentencing enhancement "of nine points under section 2F1.1(b)(1) based on the defendants' financial gain is insupportable." The case was remanded for resentencing.

United States v. Barrett, 51 F.3d 86 (7th Cir. 1995). The defendant asserted that the district court improperly determined the amount of loss, because the company he defrauded did not qualify as a "victim" because his accomplice was an employee of the company. The appellate court affirmed the district court's decision, noting that although the court has not previously defined the "scope of the term `victim' under §2F1.1 of the Guidelines," "common sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions . . . will not be imputed to his employer." The district court also noted that the loss attributed to a second company was correctly determined in accordance with Application Note 7 to USSG §2F1.1, which states that "the loss in a situation where a defendant fraudulently obtains a loan by misrepresenting the value of his assets is the amount of the loan not repaid, less the amount recovered from the sale of collateral." The sentence was affirmed.

United States v. Boatner, 99 F.3d 831 (7th Cir. 1996). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2F1.1(b), finding the defendant responsible

for the total $20,000-plus loss involved in the insurance fraud scheme, rather than the $4,600 portion of the loss that the insurance company paid to her. At sentencing, the district court found that the actions of the defendant, along with the other parties in the staged automobile accident, were jointly undertaken, the amount of loss involved exceeded the amount she received from her fraudulent claims, and that the entire amount of loss was reasonably foreseeable to her. The defendant argued that she should only be responsible for the $4,600 amount that the insurance company actually paid her, which would have resulted in a one level sentence enhancement instead four. Moreover, she maintained that the trial judge had to make an initial finding that the acts of the others involved in the scheme were within the scope of the defendant's agreement before the loss attributed to those claims could be imputed to her. The appellate court disagreed, and held that the evidence strongly supported the conclusion that the defendants were engaged in concerted activity. The court looked to its opinion in United States v. Smith, 897 F.2d 909 (7th Cir. 1990), and held that, as in that case, the activity of the others was reasonably foreseeable, and the focus is the victim's loss, not the defendant's individual profit.

United States v. Coffman, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997). The court did not err in basing its calculation of the amount of loss under USSG 2F1.1 upon the intended loss as opposed to the actual loss suffered by Smith Barney as a result of defendants' attempt to secure a loan with worthless stock. However, the court erred by increasing the amount of loss to reflect a fraud perpetrated by the defendants upon a different victim several years earlier. The court rejected defendants' argument that the appearance of the FBI prior to the completion of the transaction ensured that the actual loss suffered would be zero and in such cases the intended loss can be no greater. Instead, the court relied upon USSG 2F1.1 Application Note 10, which authorizes a downward departure where a defendant attempts to negotiate an instrument so obviously fraudulent that it would not be honored, to support its conclusion that the existence of actual loss does not affect the calculation of intended loss. Because frauds with little chance of success remain punishable, the court found that it would be unfair not to consider the differing magnitudes of intended harm. The court did err in increasing the amount of loss for sentencing purposes to reflect the loss suffered by an unrelated victim several years earlier, because the only connection between the previous and current fraud was the use of the same fraudulent stock in both instances. The prior conduct does not qualify as part of the current scheme and the previous loss should not have been used to calculate defendants' sentences.

United States v. Ferrera, 107 F.3d 537 (7th Cir.), *cert. denied*, 118 S. Ct. 202 (1997). The district court did not err in enhancing the defendant's sentence two levels under USSG §2F1.1 for misrepresenting that he was acting on behalf of "a charitable, educational, religious, or political organization or a government agency" based on his conduct in assigning the fraudulent notes. As part of the defendant's conversations with the victims of his fraud, he stated that he was a major general in the army, a member of the Executive Committee of the Mexican ruling party and a close associate of the Mexican president acting on his behalf in negotiating the notes. The defendant argued that the enhancement did not apply to his case because his conduct was not listed among the three examples, which included soliciting contributions to a non-existent famine relief organization, diverting church donations and posing as a federal collections agent collecting delinquent student loans. The circuit court rejected this argument because the examples do not correspond to each of the organizations listed in the guideline and should not be considered exhaustive. The court noted that the purpose behind the enhancement was to punish more harshly those who take advantage of a victim's trust in the government or a charitable organization. In this

particular case, investors would be looking for a safe investment for their funds and were influenced by the appearance of the notes which displayed the fictitious guarantee of the government of Mexico.

United States v. Holiusa, 13 F.3d. 1043 (7th Cir. 1994). The district court erred in basing "loss" under §2F1.1 on the full amount of money fraudulently obtained in a pyramid investment scheme where defendants had partially repaid fraudulently obtained funds before detection of the scheme. The circuit court, citing to numerous guidelines, Seventh Circuit precedent, and other circuit cases, held that "loss" should be determined by net detriment to the victim rather than the gross amount of money that changed hands. Here, since the defendants did not intend to keep the entire amount obtained and in fact returned a large portion to investors, "loss" should only be based on that portion of fraudulently obtained funds which were not returned. Judge Manion dissented, agreeing with the district court that the full amount of funds should be considered because the invested funds were "at risk" in the interim before they were returned to investors. Judge Manion argued that this case involved a straightforward application of loss under §2F1.1, whereby the funds should have been considered stolen the day defendants received them from investors regardless of whether or not they were ever returned.

United States v. Jackson, 95 F.3d 500 (7th Cir.), *cert. denied*, 519 U.S. 1018 (1996). The district court did not err in calculating the amount of loss for purposes of USSG §2F1.1 based upon the defendants' gain because the estimate was conservative, reasonable and fair. The defendants were involved in a fraudulent telemarketing scheme whereby they contacted persons who were informed that they were "guaranteed winners," ensured of receiving either a car, cash prize or five dream vacations in return for payment of the promotional fees and taxes on the prize. Once these amounts were paid, the defendants sent the winners travel vouchers to provide a small discount on certain vacation packages. In calculating loss under §2F1.1, the district court measured the defendants' gain by subtracting the cost of the prizes from the total money collected from the victims. The circuit court rejected the defendants' argument that the loss should have been calculated by subtracting the value of the prizes awarded, not simply their cost. The district court's calculation of loss was upheld because §2F1.1 Application Note 8 recognizes that "offender's gain from committing the fraud is an alternative estimate for calculating loss that ordinarily will underestimate the loss." The defendants' gain in this case was properly equated with profit. The court's characterization of this calculation as "conservative" stems from the fact that the court could easily have based the estimate on "loss" to the victim, ruled that the vouchers had no value, because they did not include travel costs, and determined "loss" to be the entire amount collected by the defendants from their victims.

United States v. Loscalzo, 18 F.3d 374 (7th Cir. 1994). The district court did not err in calculating the amount of loss under §2F1.1. The defendants defrauded the United States Post Office by representing that their corporation was a minority business in order to obtain a minority enterprise contract. They argued that the government did not incur any loss and alternatively, that the loss should have been based solely on the corporation's profits. The court of appeals disagreed. First, the government did incur a loss; the Postal Service was fraudulently induced into paying for something which it did not receive because awarding the minority enterprise contract to the defendants' corporation did not further the Postal Service's goal of increasing minority entrepreneurship. Second, since the Postal Service did not receive full consideration

(performance by a minority enterprise), loss is the difference between a true minority bid and the defendants' bid. The Seventh Circuit distinguished the defendants' case from situations in which the government did receive consideration, in which case loss would be the difference between the contract price and the contractor's costs.

United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994). The district court erred in including consequential damages in the defendant's loss calculation. The defendant owned a title company which sold title insurance written by Ticor Title Insurance Company. He defrauded Ticor by selling title insurance policies on time-shared condominium units which he claimed were unencumbered but which were actually heavily encumbered by liens. When Ticor discovered the encumbrances, it spent $476,000 eliminating the liens to clear the titles. The value of the units dropped because the defendant closed the resort which caused the condominium purchasers to threaten to sue Ticor. To avoid a lawsuit, Ticor purchased the units from each purchaser for a total cost of $565,000. The district court added this amount to the amount spent to clear the titles. The circuit court concluded that the loss determination should not include the $565,000 because it was not caused by the defendant's fraud. The court, relying on application note 7 to §2F1.1, distinguished between "loss" and consequential and incidental damages; "loss" is the "value of the money, property or services unlawfully taken," and in this case, was the value of the "promise to make the purchasers whole for any defects in the title." That promise was limited to making good only that loss caused by the defendant's fraud. The loss in the value of the property was not caused by the defective titles.

United States v. Marvin, 28 F.3d 663 (7th Cir. 1994). The district court did not err in its loss calculation. The defendant defrauded several investors by placing newspaper advertisements which promised investment returns based on telemarketed self-help manuals. He falsely claimed that the manual was copyrighted and he also provided some of the investors with fictitious radio test results. He averred that the money he spent on producing the radio ads, legal fees and money he gave to a telemarketing agency were all "legitimate business expenses" which were wrongly included in the sentencing court's loss calculation. The circuit court disagreed. Unlike a schemer who makes false representations to procure a contract but then subsequently fulfills his obligations under the contract, *see* United States v. Schneider, 930 F.2d 555 (7th Cir. 1991)(loss is limited to the amount necessary to extricate the investors from the contract plus any amounts already paid and lost), the defendant was a true con artist who had no intention of fulfilling any of the promises made to the investors. His "business expenses" were an intricate part of scheme to defraud.

United States v. Morris, 80 F.3d 1151 (7th Cir.), *cert. denied*, 519 U.S. 868 (1996). The district court did not err in interpreting the meaning of "loss" under USSG §2F1.1 to include the total actual loss suffered by the fraud victims. The defendants, former officers of Germania Bank, were convicted on two counts of mail and one count of wire fraud in connection with the bank's $10 million offering of subordinated capital notes. After the initial offering the bank—because of its deteriorating financial condition—was placed in conservatorship by the RTC. With the bank's demise, the notes became worthless, and investors recouped nothing on their investments. At sentencing, the court concluded that the actual loss to the victims of the defendants' scheme was the face amount of the notes. The defendants' argued that they should not be allocated the entire loss of the notes because factors other than their fraud had contributed to the bank's failure. On appeal, the court distinguished between cases involving an intervening cause, and cases involving

consequential and incidental losses. While the former would not serve to reduce the amount of loss attributable to a defendant's fraud, the latter are not counted in computing loss for purposes of sentencing under §2F1.1. In this case, defendants' argue that intervening forces ultimately contributed to the bank's demise. As a result, the district court was correct in calculating the loss to the victims of the defendant's scheme as the face value of the notes.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

United States v. Gresso, 24 F.3d 879 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's denial of a reduction for firearms that are possessed solely for lawful sporting purposes or collection. USSG §2K2.1(b)(2). The defendant argued that the court should not base its determination on a literal reading of the phrase "sporting purposes or collection"; rather, he asserted that the court should consider the circumstances surrounding his firearm possession, namely self-protection. The circuit court followed the First, Fifth, and Sixth Circuits in concluding that the reduction is warranted only when the firearm is acquired for sporting uses or for collection and is possessed or used solely for those purposes. *See* United States v. Shell, 972 F.2d 548 (5th Cir. 1992); United States v. Cousens, 942 F.2d 800 (1st Cir. 1991); United States v. Wilson, 878 F.2d 921 (6th Cir. 1989).

United States v. Lindsey, 30 F.3d 68 (7th Cir.), *cert. denied*, 513 U.S. 1029 (1994). The district court did not err when it enhanced the sentence of a defendant for possession of a third firearm. On appeal, the defendant argued that his offense level should not have been increased for his possession of a firearm because the testimonial evidence that the district court relied upon did not meet the minimum standards of reliability. Specifically, the defendant asserted that because none of the evidence, standing alone, would have been sufficient to support the district court's enhancement, "the sum of the three shreds of inherently unreliable and speculative evidence cannot be greater than any of its parts." The Seventh Circuit disagreed, and held that the "testimony of one witness, even one arguably biased against the defendant, is sufficient to support a finding of fact." United States v. Cedano-Rojas, 999 F.2d 1175, 1180 (7th Cir. 1993).

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996), *cert. denied*, 520 U.S. 1149 (1997). The district court properly enhanced the defendant's base offense level by four levels, pursuant to USSG §2K2.1, based on its determination that the defendant possessed firearms in connection with a drug offense. The defendant maintained that the district court erred by enhancing his base offense level because the government failed to establish that the firearms found in his home were possessed "in connection with" his marijuana dealing. The appellate court rejected this argument, holding that the phrase "in connection with" should be given its logical and common meaning. The court further noted that the phrase, at a minimum, should be interpreted broadly to mean that firearms involved must have some purpose or effect with respect to the drug trafficking crime and its presence or involvement cannot be the result of an accident or coincidence. Instead, the gun must facilitate, or have the potential of facilitating the drug trafficking offense. In the instant case, the defendant's firearms were concealed under the bed and in the closet, but there is no indication that the weapons were not readily accessible. Additionally, the court held that the seizure of the

firearms in close proximity to illegal drugs was a powerful inference that the firearms were used in connection with the drug trafficking operation.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

United States v. Seawood, 172 F.3d 986 (7th Cir. 1999). The district court did not err in departing upward one level for the defendant's use of a firearm during the crime and another level under §5K2.8 for extreme conduct. The defendant and accomplices were convicted of conspiracy, carjacking, and using a firearm in the commission of a crime of violence. During the carjacking, the three male defendants repeatedly raped one of the carjacking victims. The circuit court upheld both departures, the first being consistent with §2K2.4 because not departing would have given the defendant a shorter sentence because he was also convicted of a separate section 924(c) violation. The extreme conduct departure was found to be "perfectly appropriate in t[he
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United States v. Thomas, 77 F.3d 989 (7th Cir. 1996). The district court properly concluded that the mandatory five-year term of imprisonment under 18 U.S.C. § 924(c)(1) must be imposed consecutively to any prior state terms of imprisonment. The provision reads in relevant part: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried." The appellate court joined the Sixth and Eleventh Circuits in concluding that the language of the statute clearly evidenced a congressional intent that the mandatory punishment be in addition to any other term of imprisonment and that the phrase "term of imprisonment" included any state sentence. *See* United States v. Ospina, 18 F.3d 1332 (6th Cir. 1994); United States v. McLymont, 45 F.3d 400 (11th Cir. 1995). By contrast, the defendant relied on the Tenth Circuit's interpretation of 924(c) which held that the phrase "any other term of imprisonment" was ambiguous and could be construed narrowly to apply only to federal sentences. *See* United States v. Gonzales, 65 F.3d 814, 820 (10th Cir. 1995), *judgment vacated by*, 117 S. Ct. 1032 (1997). The appellate court refused to look beyond the statutory text and maintained that just because there was a general presumption that Congress intended federal statutes to relate to federal subjects, there was no need to rewrite the subsection 924(c) to include more specific language or resort to the legislative history. Additionally, the appellate court noted that section 924(c) not only says "any other terms of imprisonment," it says "any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried." In other words, the plain language of section 924(c) made it applicable to sentences beyond that for the underlying crime; to "any term of imprisonment." *See* United State v. Hunter, 887 F.2d 1001, 1002-03 (9th Cir. 1989) (*per curiam*).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Perez-Ruiz, 169 F.3d 1075 (7th Cir. 1999). The district court did not err in deciding that the defendant had transported aliens "for profit" and thereby was not entitled to a

three-level reduction under §2L1.1(b)(1). The defendant helped another man transport illegal aliens by driving a van from Arizona to Chicago. The defendant's compensation was the value of a trip to Chicago, as the defendant had lined up a job in Chicago and needed transportation. The Seventh Circuit agreed that the defendant had received "in-kind" compensation and he was not eligible for the other transfer profit reduction.

§2L2.1 Trafficking in Documents of Naturalization, Citizenship, or Legal Resident Status; False Statement of another's Citizenship or Immigration Status; Fraudulent Marriage

United States v. Munoz-Cerna, 47 F.3d 207 (7th Cir. 1995). The defendant was convicted of attempted armed robbery in March 1990. After serving his sentence the defendant was deported, but soon returned to the United States and was apprehended in May 1993. Congress enacted 8 U.S.C. § 1326 in 1988 to increase the criminal penalty for reentry of an alien to the United States; if the deportation followed commission of a felony, a maximum sentence of 5 years could be imposed; if it followed commission of an aggravated felony, a maximum sentence of 15 years could be imposed. When enacted, this statute's definition of aggravated felony did not include attempted armed robbery. Congress amended the definition in 1990 to include attempted armed robbery. This amended definition was not made retroactive. Therefore, the government determined that the defendant's statutory maximum sentence was five years. However, the sentencing guidelines under §2L1.2 provide for a 16-level increase (§2L1.2 was amended to provide for a 16-level increase effective 1991) if deportation followed an aggravated felony conviction, including conviction for attempted armed robbery. The defendant argued that the enhancement under §2L1.2 for an aggravated felony was improper because the statutory enhancement was prospective only, and was thus not applicable to him. The Seventh Circuit disagreed, and held that the "specific structure and language require consideration of the applicability of these two specific offense characteristics of USSG §2L1.2(b) regardless of the statutory subsection applicable to the defendant." Thus, the decision of the district court was affirmed.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Stalbaum, 63 F.3d 537 (7th Cir. 1995). In considering an issue of first impression, the circuit court held that under USSG §2P1.1, "a federal prison camp is not similar to the community institutions referenced in USSG §2P1.1(b)(3)." That section requires a reduction in sentencing for escapes from non-secure "community corrections centers, community treatment centers or halfway houses" or "similar" facilities, but provides no examples of what is "similar." The circuit court joined with six other circuits to conclude that federal prison camps are not similar to "community corrections centers, community treatment centers or halfway houses." United States v. McCullough, 53 F.3d 165 (6th Cir. 1995); United States v. Cisneros-Garcia, 14 F.3d 41 (10th Cir. 1994); United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993), *cert. denied*, 115 S. Ct. 1382 (1995); United States v. Tapia, 981 F.2d 1194 (11th Cir.), *cert. denied*, 113 S. Ct. 2979 (1993); United States v. Shaw, 979 F.2d 41 (5th Cir. 1992); United States v. Brownlee, 970 F.3d 764 (10th Cir. 1992); United States v. McGann, 960 F.2d 846 (9th Cir.), *cert. denied*, 113 S. Ct. 276 (1992).

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors

United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994). The appellate court addressed an issue of first impression in interpreting the term "bid rigging" as used in USSG §2R1.1 and the accompanying commentary, and in determining whether a "noncompetitive bid" under USSG §2R1.1(b)(1) encompasses price-fixing. The court determined that price-fixing, while technically a "noncompetitive bid," does not merit the one-level enhancement under USSG §2R1.1(b)(1). The appellate court found no specific definition in the guideline, but looked to past practice and the guideline commentary to determine that the enhancement applied to bid rigging, and not to price-fixing. The district court therefore erred in applying the one level enhancement for bid rigging where the defendants had agreed to submit identical bids, which was merely price-fixing. The appellate court opined that the term "bid rigging" means conduct involving bid rotation agreements.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Characteristic)

United States v. Maggi, 44 F.3d 478 (7th Cir. 1995). The appellate court remanded so the district court could determine whether the conspiracy charged was uncompleted, which, under the provisions of USSG §2X1.1(b)(2), would entitle the defendant to a three-level reduction in her base offense level. On appeal, the defendant alleged that she and her co-conspirator did not complete all the acts necessary to complete a money laundering conspiracy. The defendant failed to raise the issue in the district court, but the appellate court concluded that the failure to make the factual determination constituted plain error.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Grimes, 173 F.3d 634 (7th Cir. 1999). The district court did not err in applying a vulnerable victim adjustment when the defendant defrauded individuals with bad credit who were seeking unsecured loans. Victims were told over the telephone to submit an application fee of approximately $200. The defendant merely kept the application fees without assisting the victims. The ads placed in newspapers were targeted at people who were financially desperate and only a desperate individual would pay a fee of $200 merely for the right to apply for a loan and, therefore, the adjustment was proper.

United States v. Kahn, 175 F.3d 518 (7th Cir. 1999). The district court did not err by departing upward an additional offense level as the defendant's criminal actions preyed upon

multiple vulnerable victims. As part of the defendant's relevant conduct, he provided marijuana at a party he hosted for ten boys and girls aged 14 to 17. The defendant's count of conviction concerned another similar act on a different occasion, and, therefore, the one-level departure in addition to the two-level adjustment under §3A1.1 was proper.

§3A1.2 Official Victim

United States v. Aman, 31 F.3d 550 (7th Cir. 1994). The district court's retroactive application of the stricter version of USSG §3A1.2 in effect when the defendant was sentenced, instead of the more lenient version in effect when the offense was committed, violated the ex post facto clause. The Seventh Circuit, following the law as established in United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994), held that the ex post facto clause prohibits the application of a newer, more severe guideline to a defendant when it results in an increased sentence. Here, the application of the amended guideline resulted in greater punishment on the defendant, and thus violated the ex post facto clause.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Bell, 28 F.3d 615 (7th Cir. 1994). The district court erred by enhancing the defendant's offense level pursuant to USSG §3B1.1(c). Although the appellate court acknowledged that control over other individuals is not a prerequisite to an enhancement for subsection (c), it found that the defendant's mere possession of a firearm during the course of criminal activity was not sufficient to establish that the defendant was a key player in organizing the criminal activity.

United States v. Lewis, 41 F.3d 1209 (7th Cir. 1994). The appellate court affirmed the district court's decision to enhance the defendant's sentence two levels pursuant to USSG §2B1.1(b)(5)(A) for engaging in "more than minimal planning." The appellate court noted that the short time frame between the theft of the $70,000 worth of frozen hot dogs and their resale the next morning implied significant planning, as did the attempts by defendant to conceal the theft of the truck trailer. The district court also correctly enhanced the defendant's sentence pursuant to USSG §3B1.3, for using his special skill as a professional truck driver. "Although no case has yet discussed the application of the section to truck driving, it requires no leap of logic to conclude that the skills necessary to operate an 18-wheeler justify enhancement under the section."

See United States v. Ramacci, 15 F.3d 75 (7th Cir. 1994), p. 6.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Bhagavan, 116 F.3d 189 (7th Cir. 1997). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust under USSG 3B1.3. The defendant's challenge to the enhancement focuses on the nature of the victims of his scheme. The defendant relied primarily on the Seventh Circuit's opinion in United States v. Hathcoat, 30 F.3d 913 (7th Cir. 1994) and United States v. Broderson, 67 F.3d 452 (2d Cir. 1995), which both held

that this enhancement could only be used when the victim had placed the defendant in a position of trust. The defendant claims that the victim in this case was the government. Additionally, the minority shareholders could not have placed him in a position of trust because he had full power to run the company without them. The circuit court rejected these arguments and held that the defendant's position as majority shareholder and president of the company brought with it fiduciary duties to act in the interests of the minority shareholders. Thus, in that sense he did occupy a position of trust vis a vis the minority shareholders. It was enough that identifiable victims of the defendant's overall scheme to evade his taxes put him in a position of trust and that his position "contributed in some significant way to facilitating the commission or concealment of the offense." The circuit court distinguished the other circuit opinions on several grounds by pointing to Application Note 1 to USSG §3B1.3 which draws a clear distinction between one who has "professional or managerial discretion (*i.e.* substantial discretionary judgment that is ordinarily given considerable deference)" and those subject to significant supervision. In this case, unlike the other two, the defendant was found to possess both extensive managerial control and discretionary executive powers, making the actual abuse not a necessary element of the offense.

United States v. Ford, 21 F.3d 759 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's application of USSG §3B1.3 to the defendants' RICO offenses. The defendants essentially challenged that the enhancement amounted to double counting because the public bribery offenses which underlay their RICO counts necessarily involved abuse of a position of public trust. USSG §2C1.1, comment. (n.3). The defendants' argument centered on the application of §2E1.1, which instructs the sentencing court to apply the base offense level of the conduct underlying the racketeering activity if it is more than 19, the base offense level for all RICO offenses. USSG §2E1.1(a). Here, application of USSG §2E1.1(a) yielded a higher offense level which was subsequently enhanced pursuant to §3B1.3. However, had the defendants been sentenced under subsection (b), application note 3 of USSG §2C1.1 would have precluded the enhancement for abuse of a position of trust. The circuit court concluded that unlike public bribery, not all RICO activity includes an abuse of trust "so that the minimum base offense level of 19 . . . does not already incorporate that element." The defendants' particular crimes are distinguished from other RICO offenses precisely because their activity did involve abuse of trust. Whether the defendants would have received the enhancement if they were sentenced under §2C1.1 is irrelevant.

United States v. Nelson, 29 F.3d 261 (7th Cir. 1994). The Sentencing Commission did not exceed its statutory authority in enacting a two-level increase, regardless of whether the defendant acted alone or with others, "if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." "We conclude that the commentary to Section 3B1.3 is not meant to preclude a defendant who acted alone from receiving a two-level increase for abusing a position of trust." The court also disagreed that the commentary was "ambiguous so as to invoke lenity," noting that "[t]he Rule of Lenity . . . is inapplicable to interpretation of the guidelines."

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Cotts, 14 F.3d 300 (7th Cir. 1994). The district court did not wrongly enhance defendant Fernandez's sentence for obstruction of justice. A government agent, posing as a large scale drug trafficker, negotiated several reverse buys with the defendants. During the course of his dealings with the conspirators, the agent told a co-defendant of a fictitious person whom he believed was an informant. Subsequent to this conversation, the defendant plotted to kill the fictitious informant. He challenged the obstruction of justice enhancement on the grounds that conspiring to kill a person who does not exist does not obstruct anything. He further stated that he did not intend to obstruct the investigation or prosecution but only to take revenge for the informant's betrayal. The appellate court rejected this argument and relied on the language of USSG §3C1.1, which explicitly provides for an enhancement for "attempts to obstruct or impede." The district court based its enhancement on the defendant's attempt to obstruct justice "and by definition, attempt requires that one act with the purpose of effectuating the proscribed result." Further, although the district court was somewhat ambiguous in discussing the defendant's intent, the district court did expressly mention his retaliatory motive. Since application note 3(j) specifically refers to statutes encompassing retaliation against an informant, the court of appeals upheld the obstruction of justice enhancement.

United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994). The district court erred in departing upward based on the defendant's reckless endangerment to innocent individuals while in the process of fleeing police. The district court chose not to enhance the defendant's base offense level pursuant to §3C1.2 (Reckless Endangerment During Flight) or §3C1.1 (Obstructing or Impeding the Administration of Justice) because the defendant was also charged with resisting arrest and it reasoned that to apply that offense with either enhancement would constitute double counting. Application Note 4 of §3C1.1 lists examples of conduct that, "absent a separate count of conviction for such conduct", do not warrant application of §3C1.1. The circuit court found this phrase "absent a separate count" ambiguous, but it agreed with the Second Circuit that the only logical interpretation must be that the enhancement will not apply if a defendant flees arrest unless the defendant is separately convicted of fleeing arrest. Therefore, §3C1.1 may apply to fleeing arrest as long as there is also a separate conviction on this count. The court will avoid "double counting" by grouping both the obstruction of justice conduct and the underlying offense pursuant to §3D1.2. Accordingly, the district court could have applied §3C1.1 without double counting. However, this case was remanded because the district court should have applied §3C1.2 because this guideline addresses the conduct at the issue underlying the offense.

See United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994), p. 4.

United States v. Menting, 166 F.3d 923 (7th Cir. 1999). The district court did not err in applying an obstruction of justice enhancement as the defendant committed perjury at trial. The defendant argued that the “two-witness rule” of the perjury statute, 18 U.S.C. § 1621, applied and prevented application of the enhancement. To prove a violation of section 1621, the government must provide testimony from two witnesses or one witness and “sufficient corrolative evidence.” The Seventh Circuit rejected the two-witness rule at sentencing, finding the sentencing court is permitted to consider a wide range of information, as long as the information is found to be reliable.

United States v. Parker, 25 F.3d 442 (7th Cir. 1994). The district court erred in enhancing the defendant's sentence for obstruction of justice. The defendant testified falsely at his plea hearing regarding the amount of money he received from the first of four armed bank robberies. Although he did lie, the circuit court concluded that the defendant's understating of his actual "take" was not "material" because it "was not designed to substantially affect the outcome of [his] case." United States v. Dunnigan, 113 S.Ct. 1111, 1117 (1993).

United States v. Partee, 31 F.3d 529 (7th Cir. 1994). The district court erred in enhancing the defendant's sentence for obstruction of justice based on his refusal to testify at his co-conspirator's trial. The circuit court held that the enhancement was improper because the defendant's refusal to testify was not an obstruction of justice for the "instant offense" as required under section 3C1.1. Citing to the Seventh Circuit and other sister circuit precedent, the appellate court defined "instant offense" as referring only to the offense of conviction, and not to relevant conduct. Here, the defendant's refusal to testify at his co-conspirator's trial did not relate to his offense of conviction, and thus could not justify an obstruction of justice enhancement.

United States v. Perez, 50 F.3d 396 (7th Cir. 1995). The district court erred in imposing a two-level upward adjustment for obstruction of justice under USSG §3C1.1. The defendant had fled the country while state drug charges were pending against him, and then was indicted under federal drug charges when he re-entered the country. The district court reasoned that a §3C1.1 enhancement was proper because both the state and the federal prosecutions involved the same offensive conduct and found irrelevant the fact that the obstructive conduct occurred prior to any federal investigation or prosecution. The circuit court stated that the district court construed the "instant offense" language of §3C1.1 too broadly. An enhancement is proper under §3C1.1 if the obstructive conduct obstructs or impedes the "instant offense." The circuit court held that even though the state offense constituted part of the federal offense, the obstructive conduct only affected the defendant's state prosecution and had no effect on the investigation, prosecution, or sentencing of the defendant's federal offense. The circuit court vacated the enhancement and remanded for resentencing.

United States v. Robinson, 14 F.3d 1200 (7th Cir. 1994). The district court did not err in refusing to grant an extra-level reduction for acceptance of responsibility, where the defendant agreed to plead guilty "at least a week" prior to trial. The circuit court held the defendant's acceptance was not "timely" within the meaning of §3E1.1(b)(2) because the government did not receive notice early enough to avoid preparing for trial. The district court also did not err in enhancing the defendant's sentence for obstruction of justice under §3C1.1 where the defendant tried during two taped telephone conversations to persuade his co-conspirator not to give full and truthful information to the government, not to make any deals, and not to testify for the government. The circuit court affirmed the district court's finding that the defendant's instructions to his co-conspirator not to let anyone "put words in your mouth" were functionally equivalent to "keep your mouth shut," and as such constituted obstruction of justice. Nor did the district court err in considering information indicating the defendant had obstructed justice, even though he had neither been charged nor convicted of this crime. The defendant argued that the prosection violated his constitutional right of due process in "restructuring" the crime of obstruction of justice by dismissing it, only to reraise the issue at sentencing where the prosecution's burden was the lesser preponderance of the evidence standard. The circuit court rejected this argument. Finally, the

circuit court dismissed the defendant's claim that the government failed to timely file an information indicating its intent to rely on his prior convictions for sentencing purposes. The circuit court ruled the defendant waived the issue of notice of criminal history category because he specifically agreed to it when negotiating his plea agreement.

United States v. Sarna, 28 F.3d 657 (7th Cir. 1994). The district court did not err in imposing a sentence consecutive to his prior sentence for counterfeiting. The defendant pleaded guilty to counterfeiting and was released on bail. He failed to appear and was subsequently indicted for this conduct. In June 1993, the defendant was sentenced on the counterfeiting offense. One month later, he pleaded guilty to the failure to appear and was sentenced to 21 months to be served consecutive to the sentence for the counterfeiting offense. He argued that had the two offenses been consolidated in one trial, he would have received a lesser sentence because the failure to appear would have been treated as an obstruction of justice relating to the underlying counterfeiting offense. He argued that the district court was wrong to use the failure to appear as a basis for the obstruction of justice enhancement and for the additional, consecutive sentence which was characterized as a departure. *See* USSG §5G1.3, comment. n.2. The circuit court concluded that the defendant's post-flight activities were distinguishable from a simple failure to appear and it was the post-flight activities which formed the basis for the upward departure.

United States v. Sax, 39 F.3d 1380 (7th Cir. 1994). The government asserted in its cross-appeal that the district court erred in failing to increase the defendant's base offense level by two levels based on obstruction of justice under USSG §3C1.1. The district court had adopted the probation officer's view that the defendant's conduct in directing another person to deposit drug proceeds in an account did not obstruct the investigation of the conspiracy count for which the defendant was convicted. The appellate court determined that this finding was clearly erroneous, in that the cash was proceeds from the marijuana sales "which flowed from the conspiracy in which Sax was still a member. Thus, the cash was evidence relevant to establishing the charge of conspiracy to distribute marijuana for which Sax was convicted." The appellate court vacated that portion of the sentence and remanded for resentencing, and noted that the district court had simply incorrectly interpreted what constituted the "instant offense" to which the enhancement was being applied.

United States v. Winston, 34 F.3d 574 (7th Cir. 1994). The district court did not err in enhancing the defendant's offense level for obstruction of justice pursuant to §3C1.1. The enhancement was based on the defendant's conflicting testimony; he admitted at his Rule 11 change of plea hearing to possession of cocaine, but later claimed at his sentencing that the informant was the one who possessed the cocaine at the time of their arrest. The defendant argued that the disparity was only a "matter of degree" and that the two statements did not directly contradict each other. The appellate court found the record sufficient to prove the defendant had lied to the district court at his sentencing hearing and that the contradictory statements were material.

United States v. Wright, 37 F.3d 358 (7th Cir. 1994). The district court did not err in enhancing the defendant's base offense level for obstruction of justice pursuant to USSG §3C1.1. The defendant, who pleaded guilty to armed bank robbery and to being a felon in possession, argued that his telephone messages to a co-conspirator did not constitute an obstruction of justice because he did not threaten physical harm. The circuit court disagreed. An attempt to influence a

witness is an obstruction of justice even if the defendant did not threaten the witness as long as the influence is improper (*i.e.*, "that is has a natural tendency to suppress or [to] interfere with the discovery of truth"). The defendant's message that "I also know that you turned state's on me but I'll make sure you go down too Ba-by," implied that the defendant would testify against the co-conspirator if she provided testimony at his trial but would not testify against her if she remained silent. The circuit court found that this was a "clear invitation to participate in a criminal conspiracy to obstruct justice."

§3C1.2 Reckless Endangerment During Flight

See United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994), p. 20.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Brown, 14 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994). The district court did not err in refusing to group two counts involving false arrest via impersonation of a federal agent with a kidnaping count pursuant to USSG §3D1.2(b). The Seventh Circuit found that the offenses had different victims even though the district court found that the conduct involved in both false arrest counts was committed to facilitate the commission of the kidnaping.

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). The district court erred in failing to group the defendant's money laundering and mail fraud convictions pursuant to USSG §3D1.2. The circuit court held that the defendant's convictions for mail fraud and money laundering in connection with a Ponzi scheme were "closely related counts" and clearly meet the criterion to be considered part of the same continuing common criminal endeavor. The money that the defendant laundered was money defrauded from investors, therefore, absent the fraud, there would have been no funds to launder. Moreover, the money laundering took place in an effort to conceal the fraud and keep the entire scheme afloat. The circuit court rejected the government's contention that the grouping of offenses was inappropriate because they involved different victims and different harms. Relying on similar decisions in the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the court held that money laundering served to perpetuate the very scheme that produced the laundered funds and was not an "ancillary" offense.

§3D1.4 Determining the Combined Offense Level

United States v. Brown, 14 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994). The district court did not err in failing to group under §3D1.4 counts III and IV of the defendant's indictment with counts I, II and V, where the former related to kidnaping the victim and the latter to the arrest and detention of the victim's children while pretending to be a federal officer. The defendant argued that because he arrested and detained the victim's children for the purpose of facilitating the kidnaping, the victim, not her children, should be considered the "victim" of those offenses for grouping purposes. Furthermore, the defendant claims that all counts should have been grouped together because the victim in each count was the same person. The circuit court rejected this argument, holding that an offense that is committed for the purposes of facilitating

another offense can still have its own separate victim. Thus, the district court correctly grouped offenses relating to the victim separately from offenses relating to her children. The circuit court declined to review the defendant's claim that his sentence violated the principles of proportionality and uniformity on grounds that the court's jurisdiction does not extend to questions of whether a particular sentence effectuates the general goals of the guidelines. The district court's decision not to depart downward for the defendant's history of community service was unreviewable, where the district court believed it had authority to depart and did not rest its decision on an erroneous legal conclusion. The district court's decision not to depart downward to reflect the lack of uniformity and proportionality of the his sentence was unreviewable, where the district court believed it had authority to depart and did not rest its decision on an erroneous legal conclusion.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Bean, 18 F.3d 1367 (7th Cir. 1994). The district court erred in awarding a six-level downward departure under §5K2.0 for "extraordinary acceptance of responsibility," based on the defendant's repayment of an unauthorized bank loan. The trial court chose not to reduce the defendant's offense level for acceptance of responsibility under §3E1.1 because the defendant went to trial and contested his guilt. Any reduction greater than that which would have been available under §3E1.1 must depend on a "strong reason to believe, not only that the victims were not at substantial risk, but also that repetition is unlikely." This was the defendant's third conviction for defrauding a financial institution . . . "a far cry from acceptance of responsibility."

United States v. Larkin, 171 F.3d 556 (7th Cir. 1999), *petition for cert. filed* (June 23, 1999). The district court did not err in denying the defendant an acceptance of responsibility reduction where the defendant refused to identify his drug supplier. The defendant was incarcerated in a federal prison when caught possessing marijuana. The defendant was charged and convicted of possessing the narcotic in a federal prison. The Seventh Circuit found that it was clearly permissible for the sentencing court to condition the reduction for acceptance of responsibility on the defendant's willingness to provide full information regarding his crime and, therefore, his drug source. Where the defendant refused to tell the probation officer a "candid and full unraveling of the circumstances surrounding the offense of conviction, including information about the methods used by the defendant to commit his crime and the source of the contraband he possessed at the time of arrest."

United States v. Martinson, 37 F.3d 353 (7th Cir. 1994), *cert. denied*, 513 U.S. 1192 (1995). The district court clearly erred when it found that the defendant had accepted responsibility pursuant to §3E1.1. The district court based its finding on the defendant's statements acknowledging that he took money from the distributors he defrauded, and that he still owed them the money. On cross-appeal, the government argued that the reduction was unwarranted because the defendant refused to plead guilty and because he continued to deny criminal intent. The circuit court agreed, and reversed the district courts decision. Although the circuit court acknowledged that a conviction by trial does not automatically preclude a defendant from receiving a reduction for acceptance of responsibility, this was not a case in which the defendant deserved the reduction even though he put the government to its proof at trial. Rather, the defendant's continuous denials

of criminal intent and his blaming of other individuals was evidence sufficient to show that he did not accept responsibility for his criminal conduct.

United States v. McDonald, 22 F.3d 139 (7th Cir. 1994). In assessing an issue of first impression, the circuit court affirmed the district court's denial of an acceptance of responsibility adjustment based on the defendant's use of cocaine while awaiting sentencing. The defendant pleaded guilty to aiding and abetting the counterfeiting of obligations in violation of 18 U.S.C. §§ 471, 472. He argued that the sentencing court's denial was in error because it was based on uncharged conduct that was unrelated to the offense of conviction. Noting a split among several circuit courts, the Seventh Circuit joined the First, Fifth and Eleventh Circuits in holding that unrelated criminal conduct may be considered in determining whether a defendant has accepted responsibility. *See* United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991); United States v. Watkins, 911 F.2d 983 (5th Cir. 1990); United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); *but see* United States v. Morrison, 983 F.2d 730 (6th Cir. 1993) (court should not have considered conduct unrelated to the offense of conviction). Application note 1(b)'s broad language "indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally." It is reasonable for the sentencing court to view continued criminal activity, such as the use of a controlled substance, as being inconsistent with an acceptance of responsibility.

See United States v. Robinson, 14 F.3d 1200 (7th Cir. 1994), p. 21.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Hopson, 18 F.3d 465 (7th Cir.), *cert. denied*, 512 U.S. 1243 (1994). The district court did not violate the defendant's due process rights by increasing the defendant's Criminal History Category from I to II after determining that his prior state misdemeanor conviction (possession of cocaine) was not related to the conspiracy charge (distribution of cocaine) for which he was being sentenced. Key factors the court considered in determining whether the offenses were connected included: the geographic and temporal proximity of the two offenses; the fact that the prior offense was not listed in the indictment; whether a common victim was involved; and whether the defendant was given the opportunity to demonstrate a relationship between the two offenses.

See United States v. Robinson, 14 F.3d 1200 (7th Cir. 1994), p. 21.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997). The district court properly assigned a criminal history point for the defendant's one year sentence of "conditional discharge" for careless or reckless driving. The defendant asserted that

he should not have been assessed a point under USSG §4A1.2(c)(1)(A), because the sentence was not for a term of probation of at least one year or a term of imprisonment of at least 30 days. The district court concluded that an Illinois sentence of conditional discharge is the equivalent to a sentence of probation for purposes of that guideline; the defendant maintained that the two are distinct and that his reckless driving sentence did not qualify as a "term of probation". The appellate court relied on United States v. Caputo, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is "unsupervised probation" and that the Sentencing Commission equates "unsupervised probation" with supervised probation. Conditional discharge is the same as probation, but without a probation officer, and that is a distinction without a difference so far as the purposes of the guideline exception are concerned.

United States v. Joseph, 50 F.3d 401 (7th Cir.), *cert. denied*, 516 U.S. 847 (1995). The district court's refusal to decide whether the defendant's prior offenses were "consolidated" for the purpose of determining whether the cases were related for sentencing purposes was harmless error. The defendant had been sentenced on the same day for different crimes committed in different months. In concluding that the prior offenses were unrelated, the district court erred by not first determining whether the cases were consolidated and if so, whether they were separated by an intervening arrest. The district court erroneously thought it need not make this determination because the crimes themselves were unrelated. The defendant asserted that the cases should be treated as consolidated and therefore "related" because he was sentenced for both on the same day. The government responded that a formal order of consolidation is necessary before the cases can be considered consolidated. The appellate court noted that the circuit courts are split on this issue, and joined the majority of the circuits in ruling that a formal consolidation order is probative, but not conclusive in determining whether cases are consolidated. *See* United States v. Russell, 2 F.3d 200, 204 (7th Cir. 1993); United States v. Coleman, 964 F.2d 564, 566-67 (6th Cir. 1992); United States v. Garcia, 962 F.2d 479, 482-83 (5th Cir.), *cert. denied*, 113 S. Ct. 293 (1992). On the other hand, the First Circuit has held that the sine qua non of consolidated sentencing is a formal order of consolidation, United States v. Elwell, 984 F.2d 1289, 1296 (1st Cir.), *cert. denied*, 113 S. Ct. 2429 (1993), and the Eighth Circuit has held that a formal order of consolidation is required. United States v. Klein, 13 F.3d 1182 (8th Cir.), *cert. denied*, 114 S. Ct. 2722 (1994); United States v. McComber, 996 F.2d 946, 947 (8th Cir. 1993). The appellate court ruled that the district court's error was harmless in this case because the defendant would not have been able to show that the prior cases were consolidated.

United States v. Mitchell, 18 F.3d 1355 (7th Cir.), *cert. denied*, 513 U.S. 1045 (1994). The district court properly refused to entertain the defendant's collateral attack of a prior sentence used to determine his criminal history category. The defendant claimed that his prior state conviction was invalid because his plea was not entered knowingly and voluntarily and lacked sufficient factual basis. The Seventh Circuit followed the First, Fourth, Sixth, Eighth, and Eleventh Circuits in holding that "a defendant may not collaterally attack his prior state conviction at his federal sentencing unless the conviction is presumptively void." The court of appeals reasoned that a sentencing hearing is not the proper forum in which to challenge the validity of a prior conviction because such a challenge requires a fact-intensive inquiry. Such inquiries are more appropriately handled in a state collateral proceeding or by federal habeas corpus. Since a review of the record from the defendant's state court conviction did not reveal a presumptively void plea, the defendant's collateral challenge must fail.

§4A1.3 Adequacy of Criminal History

United States v. Croom, 50 F.3d 433 (7th Cir. 1995). Pursuant to USSG §4A1.3, the district court judge departed upward from Criminal History Category IV to Category VI, but did not explain why category V was not sufficient. In making the departure, the district judge stated that the guidelines did not adequately reflect the seriousness of the defendant's past crimes, some of which were juvenile offenses not counted for criminal history purposes, the fact that he committed his first federal gun offense shortly after release from state imprisonment, and his propensity to commit more crimes in the future. The appellate court stated under 18 U.S.C. § 3553(b), "[a] district judge may give a sentence exceeding the range specified by the Sentencing Guidelines only on account of circumstances `not adequately taken into consideration' by the Sentencing Commission." Two of the reasons given for the upward departure had been considered by the Commission, and therefore the appellate court remanded the case for resentencing under USSG §4A1.3.

United States v. Turchen, 187 F.3d (7th Cir. 1999). The district court permissibly departed upward on the basis of the defendant's previous acquittal "by reason of mental defect." The district court appropriately concluded that the defendant's mental instability constituted a higher likelihood of recidivism, thus justifying longer commitment to protect the public.

United States v. Walker, 98 F.3d 944 (7th Cir. 1996), *cert. denied*, 519 U.S. 1139 (1997). The appellate court affirmed the district court's decision to depart upward based on the defendant's history of convictions which, while placing him in the highest criminal history category, understated his true criminal history. The defendant argued that the court, in departing upward, relied on not only permissible factors, but impermissible factors, such as the defendant's many arrests that did not result in convictions, and prior convictions which occurred too long ago to be included in the computation of criminal history points. The appellate court held that the outdated convictions for serious offenses were usable for purposes of making an upward departure pursuant to application note 8 of USSG §4A1.3. The court reasoned that the previous offenses were pieces of a lifelong pattern of criminality and could be considered for the limited purpose of establishing the incorrigible character of the defendant's criminal propensities. The appellate court also held that the sentencing court's consideration of the defendant's 23 other arrests which didn't resulting in conviction was harmless error, in light of the sentencing judge's comments that the 37-month sentence was light for someone who qualified as a career criminal on the basis of his convicted offenses. The appellate court found that the sentence would not have been lighter had the presentencing report left out the arrests.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Damerville, 27 F.3d 254 (7th Cir.), *cert. denied*, 513 U.S. 972 (1994). The district court did not err in using a conviction for conspiracy to commit a controlled substance offense to classify the defendant as a career offender. The circuit court rejected the defendant's argument that the Sentencing Commission exceeded the mandate of 18 U.S.C. § 944(h) by including "conspiracy" to commit a controlled substance offense among offenses that qualify for the career

offender enhancement. The circuit court, citing the Eighth and Ninth Circuits' opinions in United States v. Baker, 16 F.3d 854, 857 (8th Cir. 1994); United States v. Heim, 15 F.3d 830, 832 (9th Cir.), *cert. denied*, 115 S. Ct. 55 (1994), ruled that even if the Sentencing Commission could not rely on §994(h) to subject conspiracy convictions to career offender provisions, it could rely instead on its general authority under §994(a) to specify terms for defendants not covered under §994(h). *But cf.*, United States v. Bellazerius, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S. Ct. 375 (1994); United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993).

United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). In considering an issue of first impression, the Seventh Circuit held that Application Note 2 to the Career Offender Guideline, as modified by Amendment 506, is inconsistent with the statutory mandate in 28 U.S.C. § 994(h), and is therefore invalid. 28 U.S.C. § 994(h) requires the Sentencing Commission to adopt guidelines that would sentence career offenders "at or near the maximum term authorized." Additionally, 21 U.S.C. § 841 requires that certain repeat offenders receive enhanced penalties. The court noted that prior to the promulgation of Amendment 506, which defines the relevant statutory maximum as the unenhanced statutory maximum, the circuit courts uniformly held that the relevant statutory maximum should be the enhanced statutory maximum. Considering these prior opinions together with both the text and context of section 994(h), the court concluded that Application 2 is inconsistent with section 994(h). Although noting that the First Circuit found "relevant statutory maximum" ambiguous enough to defer to the Sentencing Commission's interpretation, the Seventh Circuit concluded that the phrase was not ambiguous. The court held that by interpreting "relevant statutory maximum" to mean the unenhanced statutory maximum, the Sentencing Commission "departs from the common sense of the term 'maximum' . . . and relegates the enhanced penalties Congress provided for in section 841 to the dust bin." In holding that section 994(h) requires the use of the enhanced statutory maximum, the court acknowledged that some sentencing disparity could result "by virtue of the uneven exercise of prosecutorial discretion in invoking the heightened penalties available under section 841." Although the court noted that a key mission of the Sentencing Commission is to eliminate disparity in sentencing, the specific statutory command that career offenders be sentenced "at or near the maximum term authorized" must take precedence over the more general concern for consistency in overall sentences. As a result, to the extent that disparities exist, the situation is one for Congress, not the courts to remedy.

United States v. Killion, 30 F.3d 844 (7th Cir. 1994), *cert. denied*, 513 U.S. 1135 (1995). The district court did not err in determining that the defendant was a career offender under USSG §4B1.1. On appeal, the defendant argued that the district court erred when it relied upon a state court conviction that was wrought by a plea agreement which, the defendant claimed, violated the ex post facto clause. The appellate court affirmed the judgment of the district court, holding that the ex post facto clause does not apply to judicial constructions of statutes. Rather, the ex post facto clause is merely a "limitation upon the powers of the Legislature" and "does not apply upon its own force to the Judicial Branch of government." Thus, because the district court could constitutionally rely upon the defendant's state court conviction, the defendant could therefore be properly sentenced under USSG §4B1.1.

§4B1.2 Definitions for Career Offender

United States v. Coleman, 38 F.3d 856 (7th Cir. 1994), *cert. denied*, 513 U.S. 1197 (1995). The defendant was sentenced as a career offender following his plea of guilty to burglary of a residence on federal land. Among other issues, he contended that his two prior convictions for drug offenses should not be counted for purposes of sentencing under the career offender guideline because he was only 17 years old at the time of the convictions, and received sentences to probation. The defendant argued that only the "most serious" crimes committed prior to age 18 should count for purposes of status as a career offender, and in support, cited a case where the government had conceded the point, the Ninth Circuit's opinion in United States v. Carrillo, 991 F.2d 590, 592 (9th Cir.), *cert. denied*, 114 S. Ct. 231 (1993). This appellate court found that opinion to be "unpersuasive and in clear conflict with the Guidelines." The appellate court cited §§4B1.2 and 4A1.2, and the accompanying commentary, and held that a prior felony conviction is an offense punishable by a term of imprisonment exceeding one year, regardless of the sentence imposed, and is an "adult conviction" if it is so classified "under the laws of the jurisdiction in which the defendant was convicted." Section 4A1.2 contains no indication that only some of those offenses committed prior to age 18 may be counted. The district court properly used the defendant's prior drug convictions as predicate offenses for purposes of the career offender provision.

United States v. Mueller, 112 F.3d 277 (7th Cir. 1997). In an issue of first impression, the Seventh Circuit held that using a telephone to facilitate a drug offense, 21 U.S.C. § 843(b), constitutes a "controlled substance offense" under USSG §4B1.1. The defendant appealed the sentencing judge's determination that the defendant be treated as a career offender based on a prior conviction under 18 U.S.C. § 843(b). The defendant asserted that because the Sentencing Commission deleted from USSG §4B1.2 the specific list of statutory "controlled substance offenses" (which did not include 843(b)) and deleted language indicating that the definition included "substantially similar" offenses, the Commission did not intend 843(b) violations to be treated as controlled substance offenses. The circuit court found this argument conclusory and examined the language of §4B1.2(2), which presents a two-part inquiry: First, the sentencing court must determine if the statute prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession with intent to do so. If it does, it is a controlled substance offense. If not, the offense will be deemed a controlled substance offense if the statute involves "aiding and abetting, conspiring, [or] attempting to commit such an offense." "Unlawful use of a telephone" offenses fall into the latter category because one cannot be convicted under section 843(b) unless he also aids or abets, or attempts to commit, the drug offense itself. Two circuits have held that 843(b) effectively prohibits the same conduct as a controlled substance offense and, therefore, is a controlled substance offense. *See* United States v. Vea-Gonzales, 999 F.2d 1326 (9th Cir. 1993) (stating that 843(b) requires that in the course of using a communications facility the defendant must either commit an independent drug crime, or cause or facilitate such a crime); United States v. Walton, 56 F.3d 551 (4th Cir. 1995). The Court also noted the language in Application Note 1 to 4B1.2 which specifically denotes aiding and abetting as a controlled substance offense. Noting that the defendant did use a telephone to facilitate the manufacture and distribution of marijuana, as the plea hearing established, the Court stated that such activity could occur only if the defendant had in fact manufactured or distributed marijuana. Consequently, a violation of 21 U.S.C. § 843(b) does qualify as a "controlled substance offense" under USSG §4B1.2(2) for purposes of determining career offender status.

United States v. Rutherford, 54 F.3d 370 (7th Cir.), *cert. denied*, 516 U.S. 924 (1995). The district court did not err in ruling that the defendant's prior state conviction for first degree assault resulting from a drunk driving charge was a crime of violence under USSC §4B1.1, the Career Offender guideline. On appeal, the defendant argued that the definition of a crime of violence did not encompass vehicular assault. A crime of violence under the Career Offender guideline, USSC §4B1.1, is defined as any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. In a matter of first impression, the circuit court determined that drunk driving presents a serious risk of physical injury under the "otherwise" clause, and therefore constitutes a crime of violence. The court noted that the otherwise clause focuses on the conduct that created the risk of injury, *e.g.*, the drunk driving. The circuit court ruled that the defendant, by driving intoxicated, presented a serious potential risk of physical injury to another. The circuit court noted that the dangers of drunk driving are well-known and documented, therefore making the defendant's act sufficient to satisfy the "serious risk" standard of the "otherwise" clause.

United States v. Shannon, 94 F.3d 1065 (7th Cir. 1996). The district court erred in its determination that second degree sexual assault in Wisconsin is per se a crime of violence under USSG §4B1.2. The defendant maintained that his prior conviction of second degree sexual assault under state law did not constitute a conviction for a violent felony and thus, should not be included in the calculations of his base offense level. The guidelines define a crime of violence as a conviction for conduct that presents a serious potential risk of physical injury to another. The defendant averred that second degree sexual assault in Wisconsin is a statutory rape type of offense which does not require any physical force, or even the slightest threat of physical force, for a conviction. The circuit court agreed with the defendant, and held that by the terms of the state statute itself, his conviction should be excluded as a crime of violence under USSG §4B1.2. Although the criminal complaint alleged that the defendant dragged the 13-year-old complainant into a basement and raped her, the appellate court explained that guideline §4B1.2 plainly limits the court's inquiry into whether an offense "presented a serious risk of injury" to "an examination of the facts charged in the relevant indictment or information." United States v. Lee, 22 F.3d 736, 737 (7th Cir. 1994). Based upon the indictment, the appellate court did not find any suggestion that violence or injury was involved in the offense. The appellate court's decision was a significant departure from the Eighth Circuit's opinion in United States v. Rodriguez, 979 F.2d 138, 140-41 (8th Cir. 1992), which held that the defendant's lascivious acts with young children were by its very nature a crime of violence regardless of whether an element of violence appeared in the statute. At least three other circuits, including the Ninth, Tenth, and Eleventh Circuits, have relied on Rodriquez to reach the same conclusion where significant age disparities existed between the defendant and the victim or incest was involved. *See* United States v. Wood, 52 F.3d 272, 273-75 (9th Cir. 1995); United States v. Passi, 62 F.3d 1278, 1279 (10th Cir. 1995); Ramsey v. INS, 55 F.3d 580, 581 (11th Cir. 1995). The appellate court maintained that the instant case was distinguished from Rodriguez because the victim was almost 14 years of age and the defendant was 17—a situation which was not inherently violent. Additionally, the appellate court rejected the dissent's federal-state comity argument that because the Wisconsin legislature labeled second degree sexual assault an "assault," as opposed to "unlawful fornication," federal courts applying

the federal sentencing guidelines to federal convictions should consider it a crime of violence. The majority noted that although labels in criminal codes may be useful, uniformity in federal sentencing may best be achieved by applying the guidelines without strict reference to state criminal law definitions.

§4B1.4 Armed Career Criminal

United States v. Fuller, 15 F.3d 646 (7th Cir.), *cert. denied*, 512 U.S. 1211 (1994). The defendant claimed that the district court abused its discretion by using his prior arrest record to depart upward under §4A1.3. Under §4A1.3(d) the district court may depart upward based on the seriousness of the defendant's past criminal conduct or the likelihood that he will commit future criminal conduct. The district court must rely on the facts underlying the defendant's prior arrests rather than the arrest record itself. In this case, the circuit court affirmed the departure because the district court relied on information contained in the presentence report, not the arrest record.

United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994). The defendant was convicted for trafficking cocaine and possession of a firearm. He was sentenced to 295 months under USSG §4B1.4 as an armed career criminal, plus an additional mandatory 60 months, to be served consecutively. The additional mandatory sentence was imposed under 18 U.S.C. § 924(c) because he was carrying a firearm in connection with a drug-trafficking crime. The defendant argued that the additional 60 months should not have been consecutive because possession of a firearm was a factor that had already been taken into account in his sentence under USSG §4B1.4, thus violating the double jeopardy clause of the Fifth Amendment. The circuit court affirmed his sentence, citing the explicit language of 18 U.S.C. § 924(c) which requires a cumulative sentence in these circumstances.

United States v. Wright, 48 F.3d 254 (7th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on prior felony convictions which were over 15 years old. The defendant claimed that convictions more than 15 years old were stale and should not be considered for ACCA purposes, much like the 15-year limit on the use of felonies for sentencing purposes under USSG §4A1.2(e). In considering an issue of first impression, the Seventh Circuit joined with the Third, Fourth, Fifth, Eighth, and Eleventh Circuits in finding that no time limit exists on prior felony convictions for purposes of the ACCA. The appellate court examined the statute and concluded that if Congress intended a time restriction on the use of felonies under the ACCA it would have attached a time restriction.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases;

United States v. Arrington, 73 F.3d 144 (7th Cir. 1996). The district court did not err in refusing to apply the safety valve to the defendant. The defendant received a three-level reduction

for acceptance of responsibility under §3E1.1, but the district court determined that the defendant had not truthfully provided all the information concerning the offense under §3553(f)(5). The circuit court concluded that the admission of responsibility to obtain a reduction under §3E1.1(a) is not necessarily sufficient to satisfy section 3553(f)(5) because section 3553 requires more cooperation than §3E1.1. To satisfy section 3553(f)(5), the defendant must provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan; whereas, §3E1.1(a) requires that the defendant only admit the conduct comprising the offense(s) of conviction—there is no duty to volunteer any information aside from the conduct comprising the elements of the offense. Additionally, section 3553 states that a defendant must disclosure "all information" concerning the course of conduct—not simply the facts that form the basis for the criminal charge.

United States v. Brack, 188 F.3d 748 (7th Cir. 1999). The Government may not frustrate the defendant's attempt to qualify for "safety valve" status by rebuffing and refusing to meet with the defendant who had affirmatively offered to meet with the Government and and to provide all information in his possession concerning the offense in question.

United States v. Marshall, 83 F.3d 866 (7th Cir. 1996). The circuit court affirmed the district court's refusal to consider the defendant's eligibility to be sentenced below the statutory minimum sentence under the "safety valve" provision of 18 U.S.C. § 3553(f), USSG §5C1.2. The defendant asserted that the district court's reduction of his sentence under 18 U.S.C. § 3582(c) amounted to a new sentence, thus triggering the potential applicability of the safety valve provision. The appellate court did not reach this issue because the defendant's role adjustment made him ineligible for the "safety valve" reduction. The defendant further contended that the district court incorrectly labeled him as an organizer under USSG §3B1.1(c) for his role in spraying LSD on blotter paper. He argued that the Supreme Court's decision in Chapman v. United States, 500 U.S. 453 (1991), holding that LSD's potency in its pure form makes it necessary to use some type of carrier medium, implies that applying the drug to the necessary carrier can't qualify one as a manager or an organizer. The defendant also claimed that several of the circuit's own opinions dating back to 1989 endorsed the principle that "a mid-level trafficker must do something more than fine-tune the mode of packaging of the drug" to qualify as an organizer. The circuit court disagreed, and held that the defendant's conduct was not "fine-tuning," but packaging, and his possession of over 11,000 doses of LSD was large enough to warrant a mandatory minimum sentence. The district court correctly labeled the defendant as an organizer, which precluded any subsequent resentencing under the safety valve provision.

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Schechter, 13 F.3d 1117 (7th Cir. 1994). The district court did not err in ordering as a condition of the defendant's supervised release that he notify his employers of his past criminal conduct and current status on supervised release. The defendant, who pleaded guilty to income tax evasion and failure to file an income tax return, argued that his occupation as a computer consultant would suffer once word of his criminal history spread to all those in what he describes as the small community of computer consultant employers. He claimed the effect the district court's order would have on his ability to obtain employment was a violation of his due

process rights under the fifth amendment and the eighth amendment's prohibition against cruel and unusual punishment. The circuit court rejected this argument, holding the district court's order was justified because the defendant had stolen a total of almost $100,000 from his last three employers and the district court did not want the defendant to be "in a position of either affirmatively or passively deceiving anybody." The circuit court concluded that 18 U.S.C. §§ 3553(a), 3563(b)(6) and 3583(d) authorized the district court to impose such a condition where justified, and the order did not result in a violation of the Fifth or Eighth Amendments. Also, the circuit court dismissed for lack of appellate jurisdiction the defendant's claim that the district court erred in denying him a downward departure under §5K2.13 for reduced mental capacity.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Lampien, 89 F.3d 1316 (7th Cir. 1996). The appellant challenged the district court's order directing her to execute a quitclaim deed to her homestead. Whether the district court exceeded its authority in formulating the order. Appellant pleaded guilty to a one-count information charging her with embezzling funds from an insurance company and was sentenced to 24 months in prison to be followed by a three year term of supervised release. The district court ordered him to pay full restitution. The circuit court agreed that the Wisconsin homestead exemption does not limit the government's power under the VWPA to enforce a lien against the full value of the home for the purposes of ensuring compliance with a valid restitution order, they also concluded that the enforcement provisions of the VWPA do not authorize the district court to direct Lampien to quitclaim her homestead in favor of Wausau. The authority to collect an unpaid fine and to initiate collection of an unsatisfied order of restitution as provided is delegated to the Attorney General under section 3612(c). Yet in cases where a defendant fails to satisfy a restitution order, the sentencing court also retains certain powers to enforce compliance, which include revocation of the defendant's term of supervised release and holding the defendant in contempt of court.

§5E1.2 Fines for Individual Defendants

United States v. Monem, 104 F.3d 905 (7th Cir. 1997). In reviewing the imposition of a fine for plain error, the appellate court remanded the case for the district court to make factual findings in support of the fine assessed against the defendant with respect to his conviction for using interstate facilities to carry on a prostitution business and laundering the proceeds. Sentencing judges have an affirmative duty to make specific findings with respect to seven factors before imposing fines. Among these factors, the court must consider evidence presented concerning the defendant's ability to pay and the burden a fine would place on the defendant's dependents. USSG §5E1.2(d)(1)-(7). The sentencing court may "discharge its duty to make factual findings" by accepting the findings set forth in the presentence report. However, in this particular case, the presentence report indicated that the defendant was unable to pay a fine due to his lack of assets or monthly cash flow, but might be able to pay a fine in installments upon release from prison. Despite the probation officer's skepticism about the defendant's ability to pay, the sentencing court stated that it was adopting the findings of the presentence report and imposing a fine of $15,000. The circuit court rejected the lower court's blanket statement of adoption of the

PSR because there was an unexplained contradiction between the findings of the PSR and the fine assessed. The circuit court remanded the case to the district court to allow the court to "clarify its reasons for imposing the fine in the amount of $15,000."

United States v. Sanchez-Estrada, 62 F.3d 981 (7th Cir. 1995). The district court did not err in its decision to garnish the defendants prison wages to satisfy their fine obligations. *See* USSG §5E1.2. The appellants argued that the imposition of fines on indigent inmates violates one of the fundamental tenets of the Sentencing Reform Act, that of reducing disparity in sentences for conduct similar in nature. The circuit court stated that "this circuit has upheld the authority of the trial court to order that fines imposed may be satisfied by withdrawing sums of money from the inmate's prison earnings." *See* United States v. Gomez, 24 F.3d 924, 926-27 (7th Cir.), *cert. denied*, 115 S. Ct. 280 (1994); United States v. House, 808 F.3d 508, 510 (7th Cir. 1986).

Part G Implementing the Total Sentence of Imprisonment

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

United States v. Bell, 28 F.3d 615 (7th Cir. 1994). The district court erred in enhancing the defendant's offense level for reckless endangerment during flight, USSG §3C1.2 because it failed to consider USSG §5G1.3(b). The defendant fired a shot at a police officer during the course of his flight from arrest and served a state sentence for this offense. He argued, and the government conceded, that USSG §5G1.3(b) required the district court to give the defendant credit for time served in the state prison for the same offense. The circuit court agreed and remanded with instructions to the district court to consider USSG §5G1.3.

United States v. Goudy, 78 F.3d 309 (7th Cir. 1996). In an issue of first impression, the Seventh Circuit held that the district court did not err in sentencing defendant to a split consecutive-concurrent sentence in which the concurrent sentence was shorter than that period of time remaining on the undischarged sentence. The defendant was serving a 57-month federal sentence in Wisconsin, with 30 months remaining at the time of sentencing in the instant case. Pursuant to USSG §5G1.3(c), the district court sentenced defendant to a 37-month sentence, 16 months to run concurrently with the remaining 30-month Wisconsin sentence and 21 months to run consecutively. The defendant contends that the maximum allowable sentence for the instant offense was 30 months concurrent and 16 months consecutive, as imposition of a split sentence must begin at the time of sentencing. Noting that defendant's contention is not supported by either USSG §5G1.3(c) or the relevant commentary, the appellate court found that the district court was within its authority in calculating such a sentence. The court also found support for its sentence in comments made by John R. Steer, General Counsel, United States Sentencing Commission, "suggest[ing] that a court might impose a partially concurrent sentence commencing at a future date when neither a consecutive not a concurrent sentence would result in the appropriate punishment." Letter of John R. Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy Chief U.S. Probation Officer, United States District Court for the Eastern District of New York 7-9 (Jan. 6, 1994). The circuit court further indicated that USSG §5G1.3(c), as most recently amended, explicitly authorizes such sentences to achieve a reasonable punishment for the instant offense. Also, application note 4(B) of §5G1.3(c) permits the court to specify when the partially concurrent sentence shall begin. The court considered these latter two arguments to the extent that they are set forth as clarifying changes to the guidelines. The circuit court concluded that the district court was within its authority in sentencing the defendant and, therefore, affirmed the district court's sentence.

United States v. Plantan, 102 F.3d 953 (7th Cir. 1996). The district court properly imposed a 24-month consecutive sentence upon the defendant based on his criminal history. The defendant argued that the district court erred in refusing to impose his sentence concurrently to the sentence he already was serving for a 1992 offense, in conformity with Application Note 3 of USSG §5G1.3(c), such that he would only need to serve an additional eight months in jail. The court rejected this argument, holding that the sentencing guidelines applied to the defendant provide a formula for determining the sentence of a defendant who is already incarcerated. This formula was constructed to avoid sentencing disparity by ensuring that the total sentence for two

offenses is the same regardless of whether the defendant was charged and convicted of the offenses at the same or different times. Offenses are often grouped for sentencing purposes when a defendant is charged for all offenses at the same time. A defendant charged separately for each offense ordinarily would serve significantly more time for the same acts. The guidelines avoid this result by providing a methodology to approximate the sentencing result if the offenses had been grouped as they would be if the defendant were charged for all offenses at once. The Application Note provides that, in some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In the instant case, the judge imposed the entire sentence consecutively to the first sentence after determining that the former would not provide for a sufficient incremental penalty in light of the fact that the crime occurred three years after the one for which he was already incarcerated, and because of the extent of the defendant's ten-year criminal history.

See United States v. Sarna, 28 F.3d 657 (7th Cir. 1994), p. 22.

United States v. Shaefer, 107 F.3d 1280 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 701 (1998). The district court properly held that USSG §5G1.3(a) applied where the defendant's prior offense and the instant offense were related. The court determined that, since nothing in subsection (a) state that subsection (a) was inapplicable when the offenses were related, it applied notwithstanding the fact that the offenses were related. Prior to the defendant's sentencing, the government objected to a recommendation in the PSR that the defendant's sentence rune concurrent with the state sentence he was then serving. This recommendation was based on the fact that the state conviction and sentence had been imposed for the same drug conspiracy for which the defendant was being sentenced in the federal case. The government maintained that §5G1.3(b) not (a) applied which required consecutive sentences because while in prison the defendant had directed co-conspirator to act in furtherance of the conspiracy.

United States v. Sorensen, 58 F.3d 1154 (7th Cir. 1995). The district court erred in failing to consider the guideline methodology set forth in the commentary to USSG §5G1.3. The defendant pleaded guilty to assaulting federal officers and using a deadly and dangerous weapon in the commission of that offense and argued on appeal that the district court abused its discretion in running his federal prison term consecutive to, rather than concurrent with his state prison terms. The circuit court vacated the defendant's sentence because the district court failed to indicate on the record whether the methodology of USSG §5G1.3 had been considered. A sentencing court is required at the very least to recognize and consider the methodology in USSG §5G1.3. United States v. Brassell, 49 F.3d 274, 278 (7th Cir. 1995). The circuit court noted that the district court is not required to follow the procedure described in the commentary, and that the court retains the discretion to determine whether the methodology would result in an appropriate incremental sentence. The court must, however, provide a reason for its decision not to apply the methodology. The defendant's sentence was vacated and remanded with instructions for the court to consider the methodology of USSG §5G1.3.

United States v. Yahne, 64 F.3d 1091 (7th Cir. 1995). The district court did not err in refusing to group or consolidate the defendant's cases for sentencing purposes. The defendant pleaded guilty to charges of theft of interstate property in Illinois and Indiana. The defendant's Rule 11(e)(1)(c) plea agreement included a downward departure for substantial assistance for the

Illinois charges. The district court sentenced the defendant to 18 ½ months of incarceration, three years supervised release, a fine of $4000 and $580,000 in restitution. The defendant had already served his sentence for the Indiana theft and claimed on appeal that there was a sufficient nexus between the two cases to be consolidated under the guidelines. The defendant argued on appeal that the district court's refusal to group or consolidate the Indiana and Illinois cases resulted in an erroneous guideline range therefore resulting in an incorrect starting point for calculation of the downward departure. The circuit court ruled that USSG §5G1.3(b) does not apply to a defendant who has completely served his sentence prior to his second sentencing. *See* United States v. Blackwell, 49 F.3d 1232,1241 (7th Cir. 1995); *see also* United States v. Ogg, 992 F.2d 265, 267 (10th Cir. 1993) (interpreting 1991 USSG §5G1.3); United States v. Adeniyi, 912 F.2d 615, 618 (2d Cir. 1990) (explaining in dictum that §5G1.3 did not apply because the defendant had completed his state sentence before his federal sentence was imposed).

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Kellum, 42 F.3d 1087 (7th Cir. 1994). The appellate court granted the appellate defense counsel's motion to withdraw, holding that upon review of the record, none of the grounds for appeal were meritorious. The defendant urged, among other issues, that a downward departure should have been granted based upon his age. The appellate court noted that USSG §5H1.1 (p.s.) states that age is "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," and that there is "nothing about defendant's age (56 years old) or health that justifies a downward departure." Furthermore, the appellate court stated that because the defendant did not move for the downward departure at sentencing, any claim concerning that issue is waived on appeal.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

United States v. Canoy, 38 F.3d 893 (7th Cir. 1994). The district court erred in refusing to consider a downward departure based on the defendant's extraordinary family circumstances. The district court had refused to depart because the Seventh Circuit's decision in United States v. Thomas, 930 F.2d 526 (7th Cir.), *cert. denied*, 502 U.S. 852 (1991) prohibited departures based on family circumstances, even in extraordinary cases. The circuit court rejected the holding in Thomas, and followed other circuits' unanimous holdings that §5H1.6 permits departures from a guideline imprisonment range to account for family circumstances that may be characterized as extraordinary. (citations omitted).

United States v. Guy, 174 F.3d 859 (7th Cir. 1999). The Seventh Circuit will not review a district court's refusal to depart downward due to family circumstances when it is clear the district court knew it had the authority to depart if the facts warranted the departure. The district court found that sentencing the defendant to prison would impose hardship on her family due to her responsibilities, but also found that a person should not expect to avoid prison because they come from a large family. Because the defendant had no legal challenge to the district court's guideline interpretation, there was nothing to review.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (and 18 U.S.C. § 3553(e))

United States v. Atkinson, 15 F.3d 715 (7th Cir. 1994). The defendant pleaded guilty to marijuana and financial structuring charges. The district court originally sentenced him to 25 years in prison based on a sentencing range of 30 years to life, less a five-year reduction under USSG §5K1.1 for substantial assistance. The defendant successfully appealed this sentence based on the district court's incorrect determination of his criminal history category. At resentencing, the district court determined his correct guideline range to be 235-293 months then departed downward under §5K1.1 to 210 months, resulting in a total departure of two years and one month. The defendant appealed again, arguing that the district court abused its discretion by granting him a smaller departure at the second sentencing. The circuit court affirmed the sentence and departure holding that the district court was not bound give the same downward departure upon resentencing. Vacating a sentence nullifies the previously imposed sentence, allowing the sentencing court to begin with "a clean slate." Furthermore, the suggestion made in United States v. Thomas, 930 F.2d 526 (7th Cir.), *cert. denied*, 502 U.S. 857 (1991), that a two-point reduction be given for each factor the defendant satisfies under USSG §5K1.1 merely provides discretionary guidance and was not part of the holding of that case.

United States v. DeMaio, 28 F.3d 588 (7th Cir. 1994). The district court did not err in refusing to depart downward from the statutory mandatory minimum sentence based on the time the defendant spent at a Volunteers of America Residential Work Release Center (VOA). The defendant unsuccessfully argued that his transfer to the VOA for medical treatment benefitted the government because he was testifying for them and if, because of worsening medical problems, he were either dead or too ill to do so the government would suffer harm. However, he failed to raise this as part of his §5K1.1 "substantial assistance" argument at sentencing, and thus it was waived.

United States v. Eppinger, 49 F.3d 1244 (7th Cir. 1995). The district court did not abuse its discretion by denying the defendant's request to present evidence in camera in support of her motion for a downward departure under USSG §5K1.1. The defendant pleaded guilty to one count of conspiracy to distribute cocaine and was granted a downward departure of ten percent from the mandatory minimum sentence of ten years. The defendant claimed to be afraid to speak in open court about the circumstances surrounding her involvement in the drug trade because she had received a number of threats prior to the sentencing, and contended that the court may have granted a greater downward departure if it had allowed her to testify in camera. The circuit court ruled that the defendant failed to demonstrate compelling reasons requiring in camera testimony, and that the district court's decision did not constitute plain error.

United States v. Kelly, 14 F.3d 1169 (7th Cir. 1994). The district court did not err in failing to provide a downward departure for substantial assistance under §5K1.1, where the defendant failed to raise this issue before the sentencing court, the prosecution did not make a motion for a substantial assistance downward departure, and the defendant did not provide

specific information regarding his cooperation. The circuit court concluded that the defendant's "vague references to current cooperation and speculation about future cooperation" were not probative, and the defendant otherwise failed to show that either prosecution or the court acted unconstitutionally or unreasonably in discounting his assistance to the government.

United States v. Lezine, 166 F.3d 895 (7th Cir. 1999). The district court erred in refusing to review the defendant's claim that he had provided substantial assistance, finding that the government's refusal to move for a downward departure was within its discretion. The Seventh Circuit ruled that since the government entered into a plea agreement that stated "if the defendant provided full and truthful cooperation, a downward departure would be made—the government had limited its discretion. The government cannot unilaterally decide that a defendant has breached a plea agreement to an evidentiary hearing on the matter.

United States v. Senn, 102 F.3d 327 (7th Cir. 1996). The district court properly accepted the government's modification of its motion to reduce the defendant's sentence for substantial assistance rendered to the government. In its original motion, the government allowed for a 50 percent or 14-level reduction with respect to the conspiracy count to 24 months, which in concert with the mandatory 60-month firearms charge, would result in a total sentence of 84 months. However, the Supreme Court decision in Bailey v. United States, 116 S. Ct. 501 (1995), invalidated the government's theory of firearm use for the 18 U.S.C. § 924(c) mandatory 60-month count, and the government moved to dismiss that count, and modify its sentence recommendation. The government adjusted its recommendation to maintain a reduction that would be 50 percent from the low end of the guideline range, but it changed its recommendation to a seven-level reduction to recognize the reduction occasioned by the dismissal of the firearms charge. The district court followed that revised recommendation. The defendant argued that the government violated his right of due process by failing to provide to the court an accurate, good faith assessment of his level of cooperation in its revised motion for downward departure. The appellate court found the defendant's arguments without merit, and held that the government's rationale for amending its motion for a downward departure was cogent and consistent with the reasoning laid out in its initial motion. The government's responsibility is to describe the defendant's cooperation, to evaluate the extent of the defendant's assistance, and to qualify, in some rationale fashion, the value of that cooperation by measuring the extent of the departure from the guidelines it believes reflects meaningfully the defendant's assistance. Furthermore, the appellate court noted that in accomplishing this task, it is not at all unusual for the government to recommend a sentence reduction based on a percentage of the defendant's total sentence.

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997). The district court erred in granting only a one-level downward departure pursuant to USSG §5K1.1 for substantial assistance to authorities. The defendant argued that Application Note 2 to USSG §5K1.1 provided in part that the sentencing reduction for assistance to authorities should be considered independently of any reduction for acceptance of responsibility. The government conceded that deducting credit for substantial assistance on the ground that the defendant had already been sufficiently rewarded for acceptance of responsibility was in error, but they maintained that the error was harmless because the district court had articulated "some valid reasons" for the extent of its departure relating to the nature and extent of the defendant's assistance. The circuit court disagreed, holding that the district court's own summary of its reasoning explicitly tied the choice of a one-level reduction to the

"tremendous break" it believed the defendant had received for acceptance of responsibility. This did not appear to have been an idle or redundant observation, and thus, the Circuit Court concluded that they could not be confident that the district court considered the two provisions independently. Accordingly, the circuit court vacated the defendant's sentence and remanded for resentencing.

United States v. Wills, 35 F.3d 1192 (7th Cir. (1994). The appellate court rejected the government's argument that the prosecutor, by filing a motion for downward departure pursuant to USSG §5K1.1, but not under 18 U.S.C. § 3553(e), can restrain the district court from departing below the mandatory minimum sentence. In this case, the government moved for a downward departure from the guideline range of 87-108 months, to the mandatory minimum sentence of 60 months, but the district judge departed below the mandatory minimum to 24 months of imprisonment. The government argued that section 3553(e) and USSG §5K1.1 provided "different rewards for different levels of substantial assistance to [the] government." Although this argument has been accepted by the Eighth Circuit, *see* United States v. Rodriguez-Morales, 958 F.2d 1441, 1444 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992), it has been rejected by the Second, Fourth, Fifth, and Ninth Circuits. *See* United States v. Beckett, 996 F.2d 70, 75 (5th Cir. 1993); United States v. Cheng Ah-Kai, 951 F.2d 490, 492 (2d Cir. 1991); United States v. Keene, 933 F.2d 711 (9th Cir. 1991); United States v. Wade, 936 F.2d 169, 171 (4th Cir. 1991) (*dicta*), *aff'd on other grounds*, 502 U.S. 181 (1992). The Seventh Circuit joined the majority of circuits in holding that the government has the authority to determine whether assistance has been provided, however, once the motion for downward departure is made, the district court determines whether and to what extent departure is warranted.

§5K1.2 Refusal to Assist (Policy Statement)

United States v. Menzer, 29 F.3d 1223 (7th Cir.), *cert. denied*, 513 U.S. 1002 (1994). The district court did not err in departing upward on grounds that the defendant's base offense level for arson did not take into consideration the combination of the deaths of his two children and the extreme violence perpetrated on his wife and only surviving child. The circuit court noted that while loss of life does not automatically suggest a sentence above the authorized guideline range, the dangerousness and heinous nature of the defendant's conduct was not reflected in the offense of conviction base offense level.

§5K2.0 Grounds for Departure (Policy Statement)

See United States v. Bean, 18 F.3d 1367 (7th Cir. 1994), §3E1.1, p. 24.

United States v. Betts, 16 F.3d 748 (7th Cir. 1994). The district court properly refused to grant the defendant a downward departure based on co-defendant sentencing disparity. Although the defendant was only a courier in the drug conspiracy, he received a substantially longer sentence than either of his two co-defendants, one of whom was the admitted kingpin. Although the Seventh Circuit agreed with the district court that the sentencing disparity seemed harshly unfair, the defendant's lengthy sentence was compelled by his career criminal status. If the defendant were not sentenced under the career offender guidelines, his sentence would have been consistent

with that imposed upon his codefendants; however, application of the career offender guideline resulted in a 13-level upward enhancement of the defendant's sentence.

See United States v. Brown, 14 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994), p. 23.

United States v. Pullen, 89 F.3d 368 (7th Cir. 1996), *cert. denied*, 519 U.S. 1066 (1997). The district court did not err in refusing to grant the defendant a downward departure on the basis of extreme physical and sexual abuse as a child given the holding in Koon v. United States. The defendant argued that a departure would be in keeping with the Sentencing Reform Act's goal of retribution. The government responded that the guidelines consider the effect of a childhood history of abuse resulting in diminished capacity to comply with the law. In support of this argument, the government cited the following United States Sentencing Guidelines provisions: 1) §5H1.3 (policy statement) provides that "mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range" except as set forth in §5K2.0; 2) §5H1.12 (policy statement) provides that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range"; and 3) §5K2.13 allows diminished mental capacity as the basis for a departure only in the case of a non-violent offense. Because diminished capacity is a discouraged factor, as opposed to a prohibited factor, it may be used as a basis for departure "if the factor is present to an exceptional degree." Koon v. United States, 64 U.S.L.W. 4512, 4516 (1996). Limiting the application of this departure to the most extreme situations is important for the continued efficiency and consistency of the guidelines. The circuit court noted that the determination of whether a particular case is extraordinary is committed to the discretion of the trial judge. Given the evidence presented by the defendant, it would have been an abuse of discretion for the district court to have granted a departure in this case.

United States v. Rainone, 32 F.3d 1203 (7th Cir. 1994), *cert. denied*, 515 U.S. 1102 (1995). The district court did not err in departing upwards based on the defendants' threats against the families of their extortion victims. The defendants claimed that the upward departure was unwarranted because the threats were not communicated to the family members. Relying on a subsequent amendment authorizing upward departures for threats of bodily injury and death, see USSG §2B3.2(b)(1), the circuit court concluded that failure to communicate the threats to the family members did not affect the appropriateness of the upward departure. The appellate court also affirmed the district court's decision to depart upward because the defendants were engaged in organized crime. The defendants were part of the "Chicago Outfit" syndicate once led by Al Capone. The defendants argued that the high base offense level assigned to RICO convictions already reflected the seriousness of participation in a criminal syndicate and that an upward departure based on involvement in such criminal activity was impermissible double counting. The circuit court rejected this argument because such an extensive, durable, and notorious criminal syndicate as the Chicago Outfit is outside the heartland of RICO enterprises contemplated by the guidelines.

United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994). The defendant was convicted of misapplying bank funds. The district court held that because the version of the guidelines in effect at the time of sentencing resulted in a harsher penalty than those in effect at the time he committed

the offense, application of the later version violated the Ex Post Facto Clause. Second, the circuit court vacated the district court's downward departure for lack of a legally sufficient basis. The circuit court held that the defendant's lack of a profit motive and the desire to allow the defendant to make restitution to the victims by avoiding traditional incarceration were both improper grounds for departure. The lack of a profit motive was a factor taken into account by the guideline drafters and thus may not be a basis for a downward departure. Further, United States v. Carey, 895 F.2d 318 (7th Cir. 1990), provides that a downward departure may not be based on the fact that the defendant made restitution to his victim prior to the adjudication of his guilt. Accordingly, the promise of future restitution cannot be a basis for departure.

Extraordinary Acceptance of Responsibility

United States v. Hendrickson, 22 F.3d 170 (7th Cir.), *cert. denied*, 513 U.S. 878 (1994). The district court erred in granting the defendant a downward departure for extraordinary acceptance of responsibility. The defendant pleaded guilty to money laundering and several counts of criminal forfeiture. Prior to his sentencing, he voluntarily paid the amount of forfeiture agreed to in his plea agreement. The district court considered this act to be evidence of the defendant's extraordinary acceptance of responsibility. The circuit court reversed, holding that unlike the voluntary payment of restitution, which several courts have held may be a proper departure basis, forfeiture payments are statutorily mandated and cannot, as a matter of law, be a ground for a downward departure based on extraordinary acceptance of responsibility.

§5K2.1 Death

United States v. Purchess, 107 F.3d 1261 (7th Cir. 1997). The district court properly departed upward to account for conduct which resulted in death. The defendant argued that the death of a co-conspirator should not be used as a basis for an upward departure because the death resulted from relevant conduct and not from the offense of conviction. The defendant further maintained that he was not the cause of the co-conspirator's death, but that the co-conspirator's own voluntary actions were the cause of his death. The issue of applying a USSG §5K2.1 departure based on harm resulting from relevant conduct was one of first impression. The appellate court relied on the First, Second, and Ninth Circuits which had considered the issue and had all ruled that a court may depart upward based on harm resulting from relevant conduct. The defendant relied on two Seventh Circuit cases which held that departures should be based only on the offense of conviction. The appellate court disagreed, and held that both the prior decisions were distinguishable based on the facts of the cases. Similarly, the court looked to the Supreme Court's decision in Koon v. United States, 116 S. Ct. 2035 (1996), and the amount of deference a district court enjoys in deciding whether to depart when the particular facts of a case fall outside the "heartland" of guideline cases. In addition, the court also rejected the defendant's argument that he should not be held accountable for his co-conspirator's death. Relying on United States v. White, 979 F.2d 539 (7th Cir. 1992), the court held that when a defendant knowingly risks a victim's life or puts into motion a chain of events that makes it foreseeable that death would result, a court can depart upward for the ensuing death pursuant to USSG §5K2.1. In the instant case, the court reasoned that the defendant put into motion a series of events that resulted in the taking of a human life by setting up a drug importation business and that he was aware of the dangers of swallowing drug-filled pellets. In addition, the court found that the co-conspirator was powerless

to do anything once the drugs leaked into his body and that the defendant should, therefore, be held accountable.

§5K2.7 Disruption of Governmental Function

United States v. Horton, 98 F.3d 313 (7th Cir. 1996). The district court erred in enhancing the defendant's applicable guideline range eight levels for significantly disrupting a governmental function pursuant to USSG §5K2.7. One day after a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, the defendant tried to enter a federal building in Springfield, Illinois and then called in a bomb threat. The defendant argued that the district court's decision to depart upward significantly from the applicable guideline range was inappropriate. Although the defendant agreed that a departure was warranted under the guidelines if his conduct "resulted in a significant disruption of governmental function," he maintained that a departure of two levels would have been more appropriate. The circuit court agreed, holding that a court should determine the extent of an upward departure by comparing the seriousness of the aggravating factors that motivate the departure with the adjustments in the base offense level prescribed by the guideline provisions that apply to conduct most closely analogous to the defendant's offense conduct. *See* United States v. Ferra, 900 F.2d 1057, 1061-62 (7th Cir.1990). The circuit court reasoned that by linking the extent of the departure to the structure of the guidelines in this way, a district court could avoid the type of disparity in sentencing that the guidelines were originally designed to prevent. The circuit court concluded that the defendant in this case had not intended on carrying out the "threat" and all parties agreed that the defendant had not demonstrated an "intent" to plant an explosive device in the federal building. Given the difficulty inherent in comparing offense conduct that is aimed at creating a risk of actual injury to victims with the disruption resulting from a threat that is entirely empty, the court held that the upward departure was inappropriate and remanded for resentencing.

§5K2.8 Extreme Conduct (Policy Statement)

See United States v. Seawood, 172 F.3d 986 (7th Cir. 1999), §2K2.4, p. 14.

§5K2.12 Coercion and Duress

United States v. Steels, 38 F.3d 350 (7th Cir. 1994). The district court did not err in refusing to grant the defendant a downward departure based on coercion and duress, where the defendant claimed that, in order to boost her sentence, an undercover drug agent had coerced her into purchasing more cocaine than she intended. The circuit court concluded that the district court had not erroneously believed that it lacked the authority to depart on the basis of coercion and duress. Rather, the district court's refusal to depart was the result of its judgment that the facts did not support a finding of coercion or duress. As such, the district court's refusal to grant a downward departure was unreviewable on appeal.

United States v. Wright, 37 F.3d 358 (7th Cir. 1994). The district court did not err in denying the defendant's motion for a downward departure pursuant to §5K2.12. The defendant pleaded guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and to being a felon in possession in violation of 18 U.S.C. § 922(g). He claimed that his criminal conduct was the result of duress caused by drug dealers' demand of the value of cocaine he destroyed because he believed the cocaine was tainted. The circuit court concluded that the district court was aware of its authority to depart and that the defendant's duress was completely unrelated to the bank robbery.

§5K2.16 Voluntary Disclosure of Offense

United States v. Besler, 86 F.3d 745 (7th Cir. 1996). The district court erred in granting a downward departure under USSG §5K2.16 without making findings as to the likelihood that the offense of conviction would have been discovered absent defendant's disclosure. Departure under USSG §5K2.16 requires the following: 1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to its discovery; and 2) the offense was unlikely to have been discovered otherwise. The court considered whether USSG §5K2.16 allows downward departure in situations in which discovery is unlikely, regardless of whether the defendant is motivated by guilt or by fear of discovery. The court rejected defendant's argument that the relevant consideration is the defendant's subjective state of mind in disclosing details of the offense and found that the last sentence of the guideline clarifies that departure does not apply to a situation in which the defendant is motivated by fear. The court held that departure is justified only where the defendant's motivation is guilt and discovery is unlikely. This reflected the court's belief that the drafters of §5K2.16 intended to focus on both the defendant's state of mind and the benefit derived by the government in receiving information otherwise undiscoverable. In order to apply this departure, a court must make "particularized findings" with respect to the objective likelihood of discovery. The sentence was vacated and remanded to the district court for findings as to the objective likelihood of discovery.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. DeAngelo, 167 F.3d 1167 (7th Cir. 1999). The Seventh Circuit ruled that the presentence report provided the defendant with adequate notice by noting that a departure might be warranted under §4A1.3. The mention of the departure under a specific guideline provision comported with established sentencing procedures.

United States v. Ewers, 54 F.3d 419 (7th Cir. 1995). The district court did not err in finding factors justifying an upward departure by a preponderance of the evidence instead of the higher standard of clear and convincing evidence discussed in United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). The defendant, an attorney, was convicted of maintaining his law office as a place for the distribution of cocaine and sentenced under the 1989 version of section 2D1.8. Because the 1989 version of that guideline did not consider quantity in determining the offense level, the district court departed upward from the defendant's guideline range of 21-27 months to a sentence of 60 months based on the involvement of 3.5 to 5 kilograms of cocaine in the offense. The Seventh Circuit held that the 33-month departure was not so extreme as to invoke the Kikumura scrutiny, relying, in part, on the fact that the current guidelines would have resulted in a guideline range of 70-87 months.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations

United States v. Lee, 78 F.3d 1236 (7th Cir. 1996). The district court erred in considering sentence enhancements for habitual or recidivist offenders in determining the grade of a violation of supervised release pursuant to USSG §7B1.1. Five days after the defendant completed a term of imprisonment and began his supervised release, he was arrested for shoplifting. The defendant was convicted in state court on five counts of theft, all Class A misdemeanors carrying a maximum penalty of nine months imprisonment. Because of the defendant's criminal history, the state's habitual offender statute increased the maximum penalty for each count to three years imprisonment. The defendant's convictions violated the terms of his federal supervised release. At the revocation hearing, the defendant objected to the district courts use of the enhanced state sentence in determining the grade of his violation of supervised release. On appeal, the court held that, according to the policy statements in Chapter 7, the defendant's actual conduct determines the grade of his supervised release violation. As such, it does not include sentence enhancements for habitual or recidivist offenders. However, because the Chapter 7 policy statements are only advisory and not mandatory, once a district court correctly interprets and considers the policy statements, the court may then disregard the recommended sentence and impose any sentence unless plainly unreasonable.

§7B1.3 Revocation of Probation or Supervised Release

United States v. Fischer, 34 F.3d 566 (7th Cir. 1994). The district court did not err in determining that the defendant's failure to avoid contact with his ex-girlfriend was a violation of his terms of supervised release. The defendant's probation officer had instructed the defendant to avoid contact with his ex-girlfriend. The defendant argued that failure to follow these instructions could not be a legitimate violation because the instruction was a nonministerial command properly the subject of a court-approved condition of release and not a condition that could be left to the discretion of a probation officer. The circuit court, while agreeing that the sentencing court and not the probation officer is responsible for setting the terms of supervised release, concluded that the district court's revocation of supervised release was not actually based on the defendant's failure to follow his probation officer's instructions, but rather on the independent grounds of the dangerous and anti-social nature of the defendant's contact with his ex-girlfriend.

United States v. Hill, 48 F.3d 228 (7th Cir. 1995). The Seventh Circuit held that the policy statements in Chapter Seven are non-binding on district judges. The circuit court reversed its decision in United States v. Lewis, 998 F.2d 497 (7th Cir. 1993), which had held that all policy statements in the Guidelines Manual are binding on the sentencing judge unless inconsistent with a guideline or with a federal statute. The policy statement in §7B1.3(f) provides that the judge shall order any term of imprisonment imposed upon the revocation of supervised release to run consecutively to any prison sentence the defendant is serving. The district court judge following the holding in Lewis, sentenced the defendant to 21 months and ordered that the sentence be served consecutively to his state sentence. The circuit court reversed and remanded, basing the decision on two factors: 1) that at least six circuits had rejected the holding in Lewis and held that policy statements are non-binding, and 2) the Solicitor General believed that Lewis was decided erroneously and the government recommended that the case be remanded for resentencing. In overruling Lewis, the Seventh Circuit joined the First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits in holding that policy statements which do not interpret guidelines, including Chapter 7 statements, are non-binding. United States v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994); United States v. Sparks, 19 F.3d 1099, 1101 (6th Cir. 1994); United States v. Anderson, 15 F.3d 278, 283-84 (2d Cir. 1994); United States v. O'Neill, 11 F.3d 292, 301 (1st Cir. 1993); United States v. Levi, 2 F.3d 842, 845 (8th Cir. 1993); United States v. Hooker, 993 F.2d 898, 901 (D.C. Cir. 1993). The circuit court reasoned that Lewis misapplied Stinson v. United States, 508 U.S. 36, 39 (1993), by incorrectly assuming that Stinson made policy statements binding. Stinson held that commentary labeled "policy statement" is not robbed of its authoritative character if it interprets a guideline. The circuit court stated that Chapter 7 policy statements are entitled to great weight because the Sentencing Commission is the expert body on federal sentencing, but they do not bind the sentencing judge.

United States v. Young, 41 F.3d 1184 (7th Cir. 1994). The defendant's supervised release was revoked and he was sentenced to 22 months imprisonment based on four urine samples that tested positive for cocaine and the defendant's admitted use of cocaine. However, the defendant asserted that use of cocaine does not necessarily constitute possession. Possession may be actual or constructive. In the revocation of supervision context, "`use' is subsumed within `possession' where the defendant knowingly and voluntarily consumes the controlled substance." The district

court gave the defendant the opportunity to show why use was not proof of possession and he failed to do so. The appellate court affirmed the revocation and sentence.

§7B1.4 Term of Imprisonment

United States v. Doss, 79 F.3d 76 (7th Cir. 1996). The district court did not err in making an upward departure upon revocation of appellant's supervised release. Based on a Grade B violation of supervised release and a Criminal History Category of III, the table in USSG §7B1.4 recommended a sentencing range of 8-14 months. The district judge, however, departed upward to a two-year sentence. Appellant argued that the judge was required to sentence within the guideline framework because the judge "talked in the language of Sentencing Guidelines" by using terms such as "depart upward". The circuit court found, however, that USSG §7B1.4 is entitled weight, but, is not binding and the judge has discretion to depart outside of the recommended range. The appellant also argued that the judge abused his discretion in setting the sentence. The circuit court held that the appropriate standard for reviewing a sentence that has no sentencing guideline is the "plainly unreasonable" standard. To determine whether the sentence was "plainly unreasonable," the circuit court questioned whether 18 U.S.C. § 3583 was complied with. Finding that the sentence was the maximum allowed under 18 U.S.C. § 3583(e)(3), and that the judge took the policy statements into account and noted his reasons for the sentence on the record, the sentence was affirmed.

APPLICABLE GUIDELINES/EX POST FACTO

See United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994), p. 42.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Morgano, 39 F.3d 1358 (7th Cir. 1994), *cert. denied*, 515 U.S. 1133 (1995). The defendants asserted that the consecutive sentences they received for the RICO violation, 18 U.S.C. § 1962, charged in Count 1, and the separately charged extortion, interstate travel, and gambling violations in Counts 3 through 30 violated the double jeopardy clause of the fifth amendment. The defendants argued that the separate offenses were the predicate acts supporting the RICO conviction, and served to both enhance the RICO sentence and support separate consecutive sentences for the separate charges. Some of the substantive criminal acts were committed before November 1, 1987, and were sentenced under preguidelines law. None of the defendants received the 20 years of imprisonment authorized by statute as the maximum sentence. "[N]o double jeopardy problem arises when a sentencing court considers other charged and sentenced conduct in deriving the length of a consecutive sentence imposed for violation of a separate criminal statute." The district court did not subject the defendants to double jeopardy by relying on the predicate acts in calculating the RICO sentence, even though those acts supported separate sentences. "Consonant with the circumscribed protection afforded by the double jeopardy

clause in sentencing matters, `calculation under the Federal Sentencing Guidelines of the proper sentence within the statutory range established by Congress . . . does not constitute multiple punishment.' United States v. Alvarez, 914 F.2d 915, 920 (7th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991)."

Fifth Amendment—Due Process

United States v. Samaniego-Rodriguez, 32 F.3d 242 (7th Cir. 1994), *cert. denied*, 514 U.S. 1052 (1995). The district court did not err in sentencing the defendant to 41 months imprisonment for unlawfully reentering the United States even though the Immigration and Naturalization form the defendant signed at the time of his deportation inaccurately stated that this offense was subject to a penalty of not more than two years imprisonment. The Seventh Circuit, citing the Supreme Court's decision in United States v. Batchelder, 442 U.S. 114 (1979), ruled that the defendant's sentence did not violate his due process rights because the fair notice requirement of the due process clause is satisfied if the criminal statute under which the defendant was convicted clearly defines the conduct prohibited and the punishments authorized. Here, 8 U.S.C. § 1326 clearly provided penalties of up to 15 years imprisonment. Regardless of the inaccuracy of the INS form, the court reasoned, section 1326 provided adequate notice to satisfy the requirements of due process. The Seventh Circuit also ruled that the district court was not "equitably estopped" from sentencing the defendant under section 1326(b) because of the INS form's inaccuracies. The circuit court noted Supreme Court precedent has established that "errors by the Executive Branch cannot prevent application of the law unless the person asserting estoppel establishes all of the requirements of this doctrine at common law—including a detrimental change in position in reasonable reliance on the erroneous advice." Here, because the record contained no evidence that the defendant relied an any advice in the INS form, the district court was not "equitably estopped" from sentencing him.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Padilla, 23 F.3d 1220 (7th Cir. 1994). Although the district court's violation of Fed. R. Crim. P. 11(c) was not harmless error, the circuit court affirmed the defendant's sentence. The defendant pleaded guilty to participation in a drug conspiracy in violation of 18 U.S.C. § 846. The plea agreement not only contained misleading and incomplete information concerning the maximum penalties the defendant faced, but also the contract failed to mention the applicable statutory minimums. Further, the district court failed to advise the defendant of the mandatory minimums at his allocution. The circuit court followed United States v. Herndon, 7 F.3d 55 (5th Cir. 1993) (*per curiam*) (prosecution should request the trial judge to advise the defendant as to the statutory minimums and maximums), and United States v. Watch, 7 F.3d 422 (5th Cir. 1993)(district judge should explain to the defendant that "a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged") and held that the focus of the inquiry is on what the defendant was aware of when his plea agreement was entered. Since the defendant was never informed about the mandatory minimum term he faced and the absence of this

knowledge likely influenced his decision to plead guilty, the error was not harmless. Fed. R. Crim. P. 11(c). However, since the defendant at oral argument disclaimed his desire to seek vacatur, which the circuit court concluded was the only remedy for the error, the sentence was affirmed.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 34

United States v. Martin, 63 F.3d 1422 (7th Cir. 1995). The district court abused its discretion in sentencing the defendant to a 50-year sentence, given the knowledge that the time span would extend beyond the defendant's life expectancy. The defendant was convicted of arson (which resulted in the deaths of two firefighters) and was sentenced to fifty years imprisonment. The defendant argued on appeal that the district court abused its discretion because the jury had determined that he was not to be subjected to life imprisonment. 18 U.S.C. § 34 provides that a person convicted of arson where a death results shall be subject to the death penalty or to life imprisonment, "if the jury shall in its discretion so direct." The jury refused to subject the defendant to life imprisonment. The defendant's base offense level was calculated to be 43 which required an imposition of a life sentence. The district court reduced the defendant's base offense level to 42, yielding a sentencing range of 360 months to life and sentenced the defendant to 50 years imprisonment. The circuit court ruled that the district court abused its discretion in imposing such a sentence. The circuit court noted that although the judge and not the jury ultimately sentences the defendant, under this statute, the judge may only impose life imprisonment if the jury so directs. If the jury does not so direct, the circuit court ruled, the sentence is limited to a term of years which must be less than life. The circuit court recognized that sentencing a 45-year-old individual to 50 years in prison (of which at least 42.5 must be served) is equivalent to a life sentence and therefore beyond the power of the judge to impose. The circuit court noted that USSG §2A1.1 authorizes a downward departure where the defendant "did not cause the death intentionally or knowingly." The district court did not appear to have considered defendant's mental state or other appropriate grounds for departure, and may re-examine these issues on remand.

18 U.S.C. § 841

United States v. Garcia, 32 F.3d 1017 (7th Cir. 1994). The district court did not err in imposing upon the defendant the mandatory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(A). The defendant argued that his state conviction for possession of cocaine was not a "prior conviction" because it was related to the instant conspiracy to distribute cocaine. He relied on United States v. Blackwood, 913 F.2d 139 (4th Cir. 1990), in which the Fourth Circuit held that, for sentencing enhancement purposes, prior convictions means separate criminal episodes that occur on occasions "distinct in time." *Id.* at 147. The circuit court distinguished the defendant's case from Blackwood. Unlike the defendant in Blackwood, the defendant in the instant case had an opportunity to cease his criminal activity after his state conviction became final. This conclusion is consistent with the goal of mandatory minimum penalties to reduce recidivism.

18 U.S.C. § 924

United States v. Hudspeth, 42 F.3d 1015 (7th Cir. 1994) (*en banc*), *cert. denied*, 515 U.S. 1105 (1995). The defendant asserted that the government improperly requested an enhanced sentence under 18 U.S.C. § 924(e) at his resentencing hearing based on a different version of the defendant's criminal convictions than the government used at the original sentencing hearing, and that the district court's recalculation of his sentence after his resentencing hearing placed him in jeopardy twice for the same offense. The Seventh Circuit held, *en banc*, that sentencing enhancements based on valid prior convictions that are within the appropriate sentencing range result in no double jeopardy violations.

United States v. Patterson, 23 F.3d 1239 (7th Cir.), *cert. denied*, 513 U.S. 1007 (1994). The appellate court correctly applied the Armed Career Criminal Act to the defendant. 18 U.S.C. § 924(e). The defendant argued that two of his prior felonies that were used as predicate offenses should be considered one offense. The circuit court disagreed, stating "[c]riminal convictions will be considered separate offenses for purposes of the Armed Career Criminal Act if they are `separate and distinct criminal episodes.'" United States v. Schieman, 894 F.2d 909, 913 (7th Cir.) ("separate crimes against separate victims in separate locations" counted as separate crimes for purposes of this statute), *cert. denied*, 498 U.S. 856 (1990).

18 U.S.C. § 3583

United States v. Schechter, 13 F.3d 1117 (7th Cir. 1994). The circuit court upheld the district court's order that the defendant, as a condition of supervised release, notify any employer of his status on supervised release and his past criminal conduct, where the defendant, a computer consultant, repeatedly took money from his various employers. The court's order was authorized by 18 U.S.C. §§ 3553(a), 3563(b)(6), and 3583(d), and did not violate the fifth or eighth amendments.